Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

ELK GROVE UNIFIED SCHOOL DISTRICT,
and DAVID W. GORDON, Superintendent, EGUSD,
Petitioners,

vs.

MICHAEL A. NEWDOW,
Respondent,

On Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether the policy of Petitioner ELK GROVE UNIFIED SCHOOL DISTRICT that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," violates the establishment clause of the First Amendment to the United States Constitution?

2) Whether a non-custodial parent of a minor child has standing in federal court to challenge the policies of a public school district that require teachers to lead willing students in reciting the Pledge that includes the words "under God," when the non-custodial parent does not have legal authority to direct either the education or the religious education of the child?

List of Parties

1) MICHAEL A. NEWDOW, Plaintiff and Respondent;

2) UNITED STATES CONGRESS, Defendant;

3) UNITED STATES OF AMERICA, Defendant;

4) GEORGE W. BUSH,* President of the United States, Defendant;

5) STATE OF CALIFORNIA, Defendant;

6) ELK GROVE UNIFIED SCHOOL DISTRICT, Defendant and Petitioner;

7) DAVID W. GORDON, Superintendent, EGUSD, Defendant and Petitioner;

8) SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, Defendant; and

9) JIM SWEENEY, Superintendent, SCUSD, Defendant.

* George W. Bush was substituted for his predecessor, William Jefferson Clinton, as President of the United States, per Rule 43(c)(2) of the Federal Rules of Appellate Procedure.

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OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit, filed on February 28, 2003, is reported at Newdow v. United States Congress, 292 F.3d 597. The original version of the opinion, filed on June 26, 2002, is reported at Newdow v. United States Congress, 292 F.3d 597. Both the amended and original versions are reprinted, respectively, in the Appendix hereto, pp. 1-24 and 25-56.

The order of the Ninth Circuit denying rehearing and rehearing *en banc*, filed February 28, 2003, is reported at Newdow v. United States Congress, 321 F.3d 772, an is reprinted in the Appendix hereto, pp. 57-86.

The opinion of the Ninth Circuit wherein the Court held that Respondent has standing to assert his claims, filed December 4, 2002, is reported at Newdow v. United States Congress, 313 F.3d 500, and is reprinted in the Appendix hereto, pp. 87-96.

The memorandum order of the United States District Court for the Eastern District of California of July 21, 2000, granting Petitioners' Motion to Dismiss, is reported at Newdow v. Congress of the United States, 2000 U.S. Dist. LEXIS 22366, and is reprinted in the Appendix hereto, p. 97.

The memorandum findings and recommendation of United States Magistrate Judge Peter A. Nowinski for the United States District Court for the Eastern District of California of May 25, 2000, are reported at Newdow v. Congress of the United States, 2000 U.S. Dist. LEXIS 22367, and is reprinted in the Appendix hereto, pp. 98-99.

JURISDICTION

On March 8, 2000, Respondent brought suit against Petitioners and other Defendants in the United States District Court

for the Eastern District of California, alleging that Petitioners and others had violated the Establishment Clause of the First Amendment to the United States Constitution ("Establishment Clause") by requiring public school teachers to lead their morning classes in reciting the Pledge of Allegiance ("Pledge"). See App., pp. 3-5. Respondent also alleged that the Pledge, as amended in 1954 to include the phrase "under God," is unconstitutional.

On May 25, 2000, the Honorable Peter A. Nowinski, Magistrate Judge for the United States District Court for the Eastern District of California, filed his findings and recommendations wherein he recommended that the complaint of Respondent be dismissed. See App., p. 98. On July 21, 2000, the District Court adopted the findings and recommendations and dismissed Respondent's complaint. See App., p. 97. On July 26, 2000, Respondent appealed the dismissal of his complaint to the United States Court of Appeals for the Ninth Circuit.

On June 26, 2002, the Ninth Circuit issued an opinion reversing the District Court's Order. See App. pp. 25-56. On June 27, 2002, the Ninth Circuit stayed its judgment, and directed the clerk to stay the mandate. Petitioners timely filed a petition for rehearing and suggestion for rehearing en banc to the Ninth Circuit.

On December 4, 2002, the Ninth Circuit issued an opinion affirming its previous decision that Respondent has standing to pursue his claim in federal court. See App., pp. 87-96.

On February 28, 2003, the Ninth Circuit issued an order denying Petitioners' petition for rehearing and suggestion for rehearing *en banc*. See App., pp. 57-86. In the same order, the Ninth Circuit issued an amended opinion wherein it reversed the District Court's Order. See App., pp. 1-24.

The jurisdiction of this Court to review the Judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

First Amendment To The United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the government for a redress of grievances.

36 U.S.C. § 1972 (As amended June 14, 1954, now codified at 4 U.S.C. § 4 (1998))

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

California Education Code, Section 52720 (1989)

In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity, at which the majority of the pupils of the school normally begin the school day, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.

Elk Grove Unified School District Policy AR 6115

Each elementary school class [shall] recite the pledge of allegiance to the flag once each day.

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

An amendment to 36 U.S.C. § 1972, enacted on June 14, 1954, now codified at 4 U.S.C. § 4 (1998) ("the 1954 Act"), added the words "under God" to the Pledge. The recitation of this version of the Pledge is listed as an appropriate patriotic exercise for public elementary school children in California under section 52720 of the California Education Code. See App., p. 3.

Pursuant to a EGUSD policy, elementary school teachers begin each school day by leading their students in reciting the Pledge in conformity with Section 52720 of the California Education Code. In pertinent part, Elk Grove Unified School District's ("EGUSD") policy states that each "class [shall] recite the Pledge of Allegiance to the Flag once each day."

Respondent is an atheist and the non-custodial parent of a minor child who attends a public elementary school in the EGUSD. Respondent objects to his minor child hearing and observing willing students recite the Pledge.[1]

B. The District Court Proceedings

On March 8, 2000, Respondent filed suit against Petitioners and others in the United States District Court for the Eastern District of California, seeking declaratory and injunctive relief, but not damages. Respondent alleged that his minor daughter is injured when she is compelled to "watch and listen as her state-

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[1] The Ninth Circuit denied a Motion to Intervene filed by the mother of Respondent's minor child. See App., pp. 87-96. In the Motion to intervene, the mother indicated that the minor child is willing to recite the Pledge.

employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's (sic) is 'one nation under God.'" Respondent did not allege that Petitioners require his daughter to participate in the recitation of the Pledge. However, he did challenge the constitutionality of Petitioners' policy requiring teachers to lead willing students in reciting the Pledge. See App., p. 5. Respondent also challenged the constitutionality of Section 52720 of the California Education Code as well as the 1954 Act. Id.

Petitioners and other Defendants filed a motion to dismiss Respondent's complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Magistrate Judge Nowinski held a hearing on this motion, wherein Petitioners' requested that he issue a ruling concerning the constitutionality of the Pledge, and that the court defer ruling on other issues. Petitioners' were joined in this motion by the United States Congress, the United States, and the President of the United States. Magistrate Judge Nowinski reported his findings and recommended the entry of a judgment of dismissal finding the EGUSD's policy did not violate the First Amendment. See App., pp. 98-99. These findings and recommendations were adopted on July 21, 2000, by District Judge Milton J. Schwartz of the United States District Court for the Eastern District of California. See App., p. 97.

C. The Appellate Court Proceedings

On July 26, 2000, Respondent filed a notice of appeal from the District Court's Order. On June 26, 2002, the Ninth Circuit issued a published opinion, wherein a split panel reversed and remanded the judgment of dismissal. Contrary to the District Court's findings, the majority panel found that the 1954 amendment to the Pledge rendered the Pledge unconstitutional.

The majority panel also found that EGUSD's practice of teacher-led recitation of the Pledge was unconstitutional.

On June 27, 2002, the Ninth Circuit stayed its judgment and the issuance of the mandate. Thereafter, Petitioners timely filed a petition for rehearing and suggestion for rehearing en banc.

On December 4, 2002, the Ninth Circuit issued an opinion affirming its previous decision in this case wherein it found that Respondent, as a non-custodial parent, has standing to challenge the constitutionality of the Pledge and the EGUSD's Pledge recitation policy. See App., pp. 87-96.

On February 28, 2003, the Ninth Circuit issued an amended opinion wherein it denied Petitioners' petition for rehearing and suggestion for rehearing *en banc*. See App., pp. 57-86. The majority panel amended its opinion to hold that EGUSD's policy violates the Establishment Clause. See App., pp. 1-24. The majority's amended opinion does not expressly hold that the 1954 Act violates the First Amendment; however, this conclusion is implicit in the decision. Id.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

Review Is Warranted Because The Opinion By The Majority Panel of the Ninth Circuit Conflicts With An Opinion Of The Seventh Circuit As Well As Affirmations Contained in Opinions Of This Court.

On February 28, 2003, in a split opinion, the Ninth Circuit issued an opinion holding that the EGUSD's policy of teacher-led recitation of the Pledge is unconstitutional. See App., pp. 1-24. In reaching this decision, the majority panel impliedly found that the

Pledge is unconstitutional as it determined that reciting the Pledge with the phrase "one Nation under God" is a religious act. Review of the majority opinion is necessary and appropriate since the opinion conflicts with a decision of the Seventh Circuit and also conflicts with affirmations of this Court regarding the constitutionality of the Pledge. Moreover, because the Majority panel's error is so clear, Petitioners respectfully submit that the Court may wish to summarily reverse the Ninth Circuit's decision.

In Sherman v. Community Consolidated School District 21 of Wheeling Township, 980 F.2d 437, 444-48 (7th Cir 1992), the Seventh Circuit held that the Pledge does not violate the establishment clause. This Court had an opportunity to review the decision, but denied certiorari. Sherman v. Community Consolidated School District 21 of Wheeling Township, 508 U.S. 950 (1993).

In reaching its decision, the Sherman Court considered whether the Founding Fathers deemed ceremonial references to a deity to be understood as a prayer. 980 F.2d at 445. Using history as a guide, the Sherman court reviewed references to God by Presidents George Washington and James Madison, the author of the First Amendment, references to the opening of court sessions with the cry "God save the United States and this honorable Court," and references to God contained in the Declaration of Independence.[2] Id. at 445-446. The Sherman Court also noted that the Pledge tracks Abraham Lincoln's Gettysburg Address which ended with the statement, "that this nation, under God,

[2] One such example of a reference to God in the Declaration of Independence is the statement, "We hold these truths to be self-evident , that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."

shall have a new birth of freedom and that government of the people, by the people, for the people, shall not perish from the earth." Id. at 446.

After reviewing this Court's decisions wherein the constitutionality of the Pledge has been discussed, the Sherman Court held that the school district's policy was constitutional because the reference to God contained in the pledge is a form of ceremonial deism. Id. at 447-448. In so holding, the Sherman Court relied heavily on statements made by Justices of this Court over the years in various opinions wherein they have acknowledged the constitutionality of the Pledge.

Thus, by concluding that the EGUSD's policy of requiring elementary school teachers to lead willing students in the recitation of the Pledge is unconstitutional, the majority opinion of the Ninth Circuit in this case is in direct conflict with the Seventh Circuit's decision in Sherman.

In addition to conflicting with the Sherman opinion, the majority panel of the Ninth Circuit also runs afoul of this Court's affirmations regarding the constitutionality of the Pledge. For example, in County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 602-03, (1989), this Court noted that "previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." A number of other decisions issued by this Court also contain explicit references to the Constitutionality of the Pledge. See Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962) (signaling no constitutional violation in encouraging school children to recite historical documents which contain references to "the Deity" or to sing anthems which include the composer's professions of faith); School Dist. Of Abington Township v. Schempp, 374 U.S. 203, 304 (1963) (Brennan, J. concurring)(stating that the reference to God in the Pledge is merely a constitutional recognition of the historical

fact that our Nation was believed by its founders to have been created under God); Wallace v. Jaffree, 472 U.S. 38, 78 n.5 (1985) (O'Connor, L., concurring) ("[T]he words 'under God' in the Pledge . . .serve as an acknowledgment of religion."); Lynch v. Donnelly, 465 U.S. 668, 676 (1984) (Burger, C.J., for the court)("Other examples of reference to our religious heritage are found . . .in the language "One nation under God," as part of the Pledge of Allegiance to the American flag. That Pledge is recited by many thousands of public school children – and adults–every year."); County of Allegheny v. ACLU, 492 U.S. 573, 602-03 (1989) (Blackmun, J., for the court) ("Our previous opinions have considered in dicta . . . the pledge, characterizing [it] as consistent with the proposition that government may not communicate an endorsement of religious belief.)

Therefore, the majority's opinion in this case is in direct conflict with Sherman and is also in direct conflict with statements made by this Court in the decisions noted above. A review of the Sherman case and this Court's affirmations regarding the Pledge reveal that the Pledge is constitutional as currently codified and, consequently, EGUSD's policy regarding willing recitation of the Pledge in its schools, is constitutional. As a result, Petitioners respectfully submit that the conflicting opinion by the majority panel of the Ninth Circuit is in error and that summary reversal of the majority's decision is appropriate. Assuming arguendo this Court does not summarily reverse the majority's decision, Petitioners respectfully submit that review by this Court is warranted.

II.

Review Is Warranted Because the Majority's Decision Conflicts With This Court's Holding in West Virginia State Board of Education v. Barnette.

In the amended opinion, the majority failed to consider the import of this Court's decision in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). In Barnette, this Court held that a West Virginia regulation that required schoolchildren in the state to recite the Pledge[3] or be considered insubordinate was unconstitutional. Id. at 1187. The Plaintiffs in Barnette were Jehovah's Witnesses who refused to salute the flag in accordance with their religious beliefs. Id. at 1181. In deciding the case, this Court noted that compulsory recitation of the Pledge "requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks." Id. at 1183. This Court also noted that "[F]ree public education, if faithful to the idea of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction." Id. at 1185.

In spite of concerns that compelling students to recite the Pledge violated students' free speech rights by compelling political ideology in violation of the First Amendment, this Court did not outlaw the recitation of the Pledge in public schools. Instead, this Court determined that states (and school districts) cannot compel students to recite the Pledge. Nevertheless, this Court continued to allow the Pledge to be recited by willing students.

Contrary to this Court's teaching in Barnette, the majority in the instant case found that the recitation of the Pledge has a coercive effect which is "particularly pronounced in the school setting given the age and impressionability of school children." Tellingly, in Barnette, this Court did not find that hearing other students recite the Pledge has a coercive effect on students so as to

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[3] Petitioners understand that the Pledge did not contain the phrase "under God" when Barnette was decided.

constitute a violation of that student's rights under the First Amendment. Thus, even if a student feels that certain content of the Pledge violates his or her First Amendment rights, that student's rights are sufficiently protected by not being required to recite the Pledge. Therefore, summary reversal is warranted in that the majority's decision cannot be reconciled with the holding in Barnette. Alternatively, Petitioners respectfully submit that review is warranted so the majority's decision can be reconciled with this Court's decision in Barnette.

III.

Review Is Warranted Because The Majority Improperly Found That The Pledge Is A Profession Of Religious Belief.

The majority panel of the Ninth Circuit held that in the context of the Pledge, the statement that the United States is a nation "under God" is a profession of religious belief. See App. pp. 11-12. In so holding, the majority determined that the statement is not a "mere acknowledgment that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion in the founding of the Republic." Id. On that basis, the majority found that EGUSD's policy places students in the position of having to choose to participate in an exercise with religious content or to protest. Unfortunately, the majority assumed the statement "under God" is a profession of religious belief rather than analyzing whether the recitation of the Pledge is a religious act..

The majority's rationale regarding the Pledge being a profession of religious belief is based on the faulty presumption that the Pledge takes a position with respect to the existence of God. What is clear from a thorough examination of the legislative history of the 1954 Act is that in amending the Pledge to include

the phrase "under God," Congress only intended to acknowledge the role of God in the history of our country. Specifically, the House Report reveals:

> From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God. For example, our colonial forebears recognized the inherent truth that any government must look to God to survive and prosper. H.R. Rep. No. 83-1693, at 2 (1954).

The House Report further reflected on references to God in the Declaration of Independence, the inscription of "In God We Trust" on currency and coins, and references to God in the Gettysburg Address. Id. Representative Louis C. Rabaut, in testifying at the subcommittee hearing, described the need for the legislation as follows:

> "By the addition of the phrase 'under God' to the pledge, the consciousness of the American people will be more alerted to the true meaning of our country and its form of government."

Id. at 3. He further stated that "the children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins. " Id. These remarks establish that Representative Rabaut felt the amendment would help teach children about the role of religion in the history of the United States.

Most important in evaluating whether the amendment to the Pledge takes a position with respect to the existence of God is

an opinion authored by the Legislative Reference Service of the Library of Congress. The Legislative Reference Service determined that the phrase "under God" was a modifier to the phrase "one Nation" because the addition was intended to affirm that the United States was founded on a fundamental belief in God. This analysis underscores the idea that the addition of the phrase "under God" to the Pledge was done for a secular purpose – the affirmation of the concept that the United States was founded on a fundamental belief in God.

The phrase does not compel anyone to believe in the existence of God or recognize religion in general. Instead, it merely reflects the role of religion in the history of the United States.

Further, as stated by Justice O'Scannlain in his dissent from the denial of rehearing *en banc* in this matter, recitation of the Pledge is a patriotic act – not a religious act. See App., pp. 78-79. This is confirmed by noting that the California statute under which EGUSD created its policy that is at issue herein is entitled "[d]aily performance of patriotic exercises in public schools. On the other hand, a religious expression takes the form of prayer. In contrast, patriotic invocations of God do not attempt to establish a state religion, nor suppress the exercise or non-exercise of religion.

As noted by Justice O'Scannlain, if the statement "under God" in the Pledge constitutes a religious act, then historical works such as the Constitution, the Declaration of Independence, and the Gettysburg Address, to name a few, as well as the National Anthem and the National motto would also violate the Establishment Clause. See App., p. 80. As the Sherman Court asked, were the "founders of the United States . . . unable to understand their own handiwork[?]" Sherman, 980 F.2d at 445.

Based on the legislative history of the Pledge and the affirmations of this Court, it is clear that the Pledge is not a

religious act and therefore does not violate the Establishment Clause. Since the majority's finding that the Pledge is a religious act is in conflict with prior affirmations of this Court regarding the constitutionality of the Pledge, Petitioners respectfully submit that summary reversal of the decision is warranted. Petitioners respectfully submit that, at the least, review is warranted as the Pledge as currently codified is not a religious act nor does it convey a religious belief.

IV.

Review Is Warranted Because The Majority Failed To Recognize This Court's Flexible Approach To Deciding Establishment Clause Cases.

While the Ninth Circuit majority recognized that this Court has utilized three tests over the years to analyze violations of the Establishment Clause, it failed to recognize the analytical flexibility inherent in this Court's decisions in Establishment Clause cases. The three tests considered by the majority were (1) the Lemon test named for Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971), (2) the "endorsement test" proposed by Justice O'Connor in her concurring opinion in Lynch, and (3) the "coercion test" promulgated in Lee v. Weisman, 505 U.S. 577 (1992). See App., pp. 8-11. The majority did not, however, consider the fact that this Court has not limited its evaluation of the Establishment Clause to these three tests. In fact, in Lynch, this Court stated, ". . . we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area." Lynch, 465 U.S. at 679, citing, Tilton v. Richardson, 403 U.S. 672, 677-678 (1971).

The flexibility of this Court's analysis is best exemplified in Marsh v. Chambers, 463 U.S. 783, 792 (1983). In Marsh, this Court held that the Nebraska Legislature's practice of opening its

daily sessions with a prayer led by a Chaplin who was paid by the state did not violate the Establishment Clause. In reaching this decision, this Court reviewed the history of legislative prayer at both the national and state levels and affirmed legislative prayer based upon the historical acceptance of the practice which had become "part of the fabric of our society." Id.

This Court's discussion of ceremonial references to God in Marsh, Engle, Schempp, Lynch, Wallace and Allegheny underscores the need for courts to maintain flexibility in analyzing Establishment Clause cases because the historical significance and ceremonial nature of the practice at issue may render the practice constitutional. It is this flexibility that this Court utilized in Marsh to create an Establishment Clause analysis premised on a practice being constitutional because it is a "fabric of our society."

As evidenced by the national uproar caused by the majority's decisions in this case as well as the fact that the Pledge has been recited in its current form by millions of people both in school and outside the school context for forty-eight consecutive years, the reference to God in the Pledge is interwoven into the "fabric of our society." Thus, utilizing a flexible test such as Marsh, when considered in conjunction with historical references to God and the affirmations of this Court, the Pledge does not violate the Establishment Clause. Therefore, review of the majority opinion is warranted by this Court.

V.

Review Is Warranted Because Of The National Importance In Determining Whether The Pledge Of Allegiance, As Recited By Millions of Public School Children Over The Last Half Of The Century, Is Constitutional

As noted above, a two judge panel of the Ninth Circuit has

effectively banned the recitation of the Pledge of Allegiance by all school children in the nine western states. At a minimum, this decision effects over 9.6 million students. See App., p. 67. Significantly, this decision will result in substantial disruption of the daily lives of the school children in the EGUSD, as well as those attending public schools within the jurisdiction of the Ninth Circuit. These school children will find it necessary to reconcile why they are prohibited from willingly reciting the Pledge as a daily patriotic exercise when the public school children in the rest of the country are permitted to say the Pledge. This decision will also cause confusion on the part of the children in the Ninth Circuit as to why they, along with all of the adults living in the Ninth Circuit can recite the Pledge at almost any time or place other than in their public school. Petitioners respectfully submit that the majority's decision in which it effectively restricts school children in the nine western states from willingly reciting the Pledge on a daily basis at their public school presents a substantial issue of national importance which merits review by this Court.

This Court has recognized that a legislative prayer may have received such widespread historical acceptance that it becomes a patriotic exercise which is part of the fabric of our society. Marsh, 463 U.S. at 792. The Pledge as adopted in the 1954 Act clearly falls within that category. Introduced to the nation, and its school children, by proclamation of President Eisenhower, scores of citizens of the United States have been raised and attended school with the Pledge as an integral part of our national fabric. The population of the Untied States has increased by over 120 million citizens since 1954 and a substantial number of those citizens were introduced to the Pledge when they

attended public schools.[4] Moreover, the citizenry beyond school age at the time of the 1954 Act have adopted and embraced the Pledge by reciting it at public gatherings, ceremonies, commencement of court proceedings, little league games, scouting events and fraternal organizations, to name a few.

The decision by the majority in this case has affected all of our citizenry as demonstrated by the public and political outcry throughout our country when this decision was published.[5] Not only has there been an adverse reaction to the fact that the school children in the nine western states will be banned from willingly reciting the Pledge in public schools, this decision implies that the Pledge itself is unconstitutional. See App., p. 67. Petitioners respectfully submit that this implied finding that the Pledge is unconstitutional is of national importance because it affects citizens throughout the United States who have known and respected the Pledge over the past forty-eight years.[6]

Review of this case is also warranted because of the need for this Court to clarify the difference between the traditional role of religion in our national life and what constitutes the establishment of religion or interference with the free exercise or

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[4] The National Population Estimates prepared by the US Census Bureau estimates the national population of the United States as of July 1, 1954 to be 163,025,854 compared with an increase on July 1, 2001 to an estimated 284,796,887. See U.S. Census Bureau website; http://eire.census.gov/popest/data/national/tables/NA-EST2001-01.php

[5] See also, Church of the Holy Trinity v. United States, 143 U.S. 457, 465-471 (1892) (citing numerous examples of expressions that ours is historically a religious nation.

[6] There were 10 judges on the Ninth Circuit Court of Appeals who expressed their view that this case was sufficiently important that it merited review by an en banc panel. See App., pp. 65 and 86.

non-exercise of religion. Our country has myriad examples of the historical importance of religion on the daily lives of our ancestors. The historical role of God is reflected in our national motto of "IN GOD WE TRUST", our National Anthem and other patriotic songs such as "GOD BLESS AMERICA", "AMERICA THE BEAUTIFUL" and "MY COUNTRY TIS OF THEE", the Declaration of Independence, the Gettysburg Address, the Constitutions of numerous states, the formal announcement of this Court and other Courts throughout our nation, numerous inaugural addresses of Presidents of these United States and as engraved in the monuments to Presidents of this nation. See, App., pp. 23, 68-69, 80-81. Certainly the founding fathers of our country did not expect that we would one day be called upon to eliminate the numerous references to the historical role of religion in one or all of our patriotic exercises in public schools. As correctly pointed out by Justice O'Scannlain, interpretations of the establishment clause must take into consideration our 200 year history and tradition of patriotic references to God. See App., p. 79. The Ninth Circuit's opinion is one of national importance because it expands interpretation of the Establishment Clause to create an unacceptable wall of separation between God and state that has no historical foundation.

Review of the decision by the Ninth Circuit is also warranted to avoid a need for unnecessary and costly litigation. First, this decision may be a springboard for piecemeal litigation in the other Federal Courts throughout the country. Second, the decision by the majority panel may result in civil actions for damages or other relief against school districts, their administrators and teachers throughout the nine western states because reciting the Pledge is now considered by the Ninth Circuit to be a violation of a student or parent's constitutional rights. At a time when most school districts are facing severe budget crises, particularly in California, the most effective way to prevent this unnecessary and expensive litigation would be for this Court to

either summarily reverse the decision by the Ninth Circuit in this case or to grant review because of the potential impact on the nation by this decision.

The Pledge is a symbol of national pride and one of the most important patriotic exercises performed by citizens of the United States. This Court previously resolved the issue of permitting recitation of the Pledge by willing students in public schools in Barnette and there is no reason to alter the result in that decision as attempted by the majority in this case. A need for a uniform Pledge throughout the United States, which may be learned and recited by willing students in public schools, is fundamental in establishing and preserving a sense of national unity and identity. It is of national importance the Pledge be taught and recited by willing students so that the Pledge may be uniformly recited by all citizens who choose to do so.

For each of those reasons, Petitioners respectfully submit that the issues raised by the decision of the majority panel in the Ninth Circuit in this case are of national importance because of the substantial impact this decision will have on the citizens of the nine western states as well as citizens throughout the United States. Therefore, Petitioners respectfully request that this Court either summarily reverse the Ninth Circuit decision or grant review of this important issue.

VI.

Review Is Warranted Because The Ninth Circuit Erroneously Found That Respondent Has Standing To Bring Suit.

The Ninth Circuit concluded that Respondent has standing, as a parent, to challenge a practice that interferes with his right to direct the religious education of his daughter, even though Respondent does not have legal custody of his daughter. See App.,

pp. 87-96. No California court has addressed whether an award of sole legal custody to one California parent deprives the non-custodial California parent of his ability to affect decisions concerning the health, education or welfare of a child. However, California statutes addressing custody dictate that a non-custodial parent, such as Respondent, does not have the ability to affect decisions relating to the child's health, education or welfare. See Cal. Family Code § 3003 (defining "joint legal custody" as both parents *sharing* the right to make decisions regarding the health, education and welfare of their child) [emphasis added]; Cal. Family Code § 3006 [defining "sole legal custody" as *one parent* having the sole right and responsibility to make such decisions] [emphasis added]. Thus, Respondent does not have the legal right under California law to direct matters related to his minor child's health, education or welfare.

Because Respondent does not have legal custody of his daughter, he also lacks the authority to decide what religious education she shall receive. In Re: Marriage of Murga, 103 Cal. App.3d 498, 505 (1980). Thus, to the extent the Pledge is considered to be "religious education," Respondent does not have any legal right under California law to determine his daughter's religious education. Consequently, Respondent has not suffered an injury in fact and does not have standing to challenge the constitutionality of the Pledge recited by his daughter's classmates.

In reaching a conclusion to the contrary, the Ninth Circuit has inappropriately enlarged the pool of potential plaintiffs who may now file similar and meritless lawsuits in California and other states with child-custody schemes resembling those of California. Indeed, such non-custodial parents may now maintain such suits even in instances where the custodial parent supports the policies or statutes in question. Petitioners respectfully submit that, as a matter of national importance, review of the Ninth Circuit's decision regarding respondent's standing in this case is warranted

because the decision makes moot a state's custody determinations if a noncustodial parent can bring suit in contradiction of decisions made by the custodial parent.

CONCLUSION

Based on the foregoing, Petitioners respectfully submit that this Petition for Writ of Certiorari should be granted. The Court may wish to consider summary reversal of the decision of the Ninth Circuit Court of Appeals.

Dated: April 30, 2003

Respectfully submitted,

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APPENDIX

Editor's Note

Incomplete document.

FILED

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OFFICE OF THE CLERK

No.

In The

SUPREME COURT OF THE UNITED STATES

ELK GROVE UNIFIED SCHOOL DISTRICT,
and DAVID W. GORDON, Superintendent, EGUSD,
Petitioners,

vs.

MICHAEL A. NEWDOW,
Respondent,

On Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL A. NEWDOW, *Plaintiff-Appellant,* v. US CONGRESS; UNITED STATES OF AMERICA; GEORGE W. BUSH,* President of the United States; STATE OF CALIFORNIA; ELK GROVE UNIFIED SCHOOL DISTRICT; DAVID W. GORDON, Superintendent EGUSD; SACRAMENTO CITY UNIFIED SCHOOL DISTRICT; JIM SWEENEY, Superintendent SCUSD, *Defendants-Appellees.*	No. 00-16423 D.C. No. CV-00-00495- MLS/PAN AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
Milton L. Schwartz, Senior Judge, Presiding

Argued and Submitted
March 14, 2002–San Francisco, California

Filed June 26, 2002
Amended February 28, 2003

* George W. Bush is substituted for his predecessor, William Jefferson Clinton,

as President of the United States. Fed. R. App. P. 43 (c)(2).

Before: Alfred T. Goodwin, Stephen Reinhardt and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Goodwin;
Partial Concurrence and Partial Dissent by Judge Fernandez

COUNSEL

Michael Newdow, Pro Se, Sacramento, California, for the plaintiff-appellant.

Kristin S. Door, Assistant United States Attorney, Sacramento, California, Lowell V. Sturgill, Jr., Department of Justice, Washington, D.C., for federal government defendants-appellees; A. Irving Scott, Terence J. Cassidy, Porter, Scott, Weiberg & Delehant, Sacramento, California, for school district defendants-appellees.

OPINION

GOODWIN, Circuit Judge:

Michael Newdow appeals pro se a judgment dismissing his challenge to the constitutionality of the words "under God" in the Pledge of Allegiance to the Flag. Newdow argues that the addition of these words by a 1954 federal statute to the previous version of the Pledge of Allegiance (which made no reference to God) and the daily recitation in the classroom of the Pledge of Allegiance, with the added words included, by his daughter's public school

teacher are violations of the Establishment Clause of the First Amendment to the United States Constitution.

FACTUAL AND PROCEDURAL BACKGROUND

Newdow is an atheist whose daughter attends public elementary school in the Elk Grove Unified School District ("EGUSD") in California. In accordance with state law and a school district rule, EGUSD teachers begin each school day by leading their students in a recitation of the Pledge of Allegiance ("the Pledge"). The California Education Code requires that public schools begin each school day with "appropriate patriotic exercises" and that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy" this requirement. Cal. Educ. Code § 52720 (1989) (hereinafter "California statute").[1] To implement the California statute, the school district that Newdow's daughter attends has promulgated a policy that states, in pertinent part: "Each elementary school class [shall] recite the pledge of allegiance to the flag once each day."

The classmates of Newdow's daughter in the EGUSD are

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[1] The relevant portion of California Education Code § 52720 reads:

> In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.

led by their teacher in reciting the Pledge codified in federal law. On June 22, 1942, Congress first codified the Pledge as "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." Pub.L. No. 623, Ch. 435, § 7, 56 Stat. 380 (1942) (codified at 36 U.S.C. § 1972). On June 14, 1954, Congress amended Section 1972 to add the words "under God" after the word "Nation." Pub.L. No. 396, Ch. 297, 68 Stat. 249 (1954) ("1954 Act"). The Pledge is currently codified as "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all." 4 U.S.C. § 4 (1998) (Title 36 was revised and recodified by Pub.L. No. 105-225, § 2(a), 112 Stat. 1494 (1998). Section 172 was abolished, and the Pledge is now found in Title 4.)

Newdow does not allege that his daughter's teacher or school district requires his daughter to participate in reciting the Pledge.[2] Rather, he claims that his daughter is injured when she is compelled to "watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's [sic] is 'one nation under God.'"

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[2] Compelling students to recite the Pledge was held to be a First Amendment violation in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) ("[T]he action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."). *Barnette* was decided before the 1954 Act added the words "under God" to the Pledge.

Newdow's complaint in the district court challenged the constitutionality, under the First Amendment, of the 1954 Act, the California statute, and the school district's policy requiring teachers to lead willing students in recitation of the Pledge. He sought declaratory and injunctive relief, but did not seek damages.

The school districts and their superintendents (collectively, "school district defendants") filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim. Magistrate Judge Peter A. Nowinski held a hearing at which the school district defendants requested that the court rule only on the constitutionality of the Pledge, and defer any ruling on sovereign immunity. The United States Congress, the United States, and the President of the United States (collectively, "the federal defendants") joined in the motion to dismiss filed by the school district defendants. The magistrate judge reported findings and a recommendation that the district court hold that the daily Pledge ceremony in the schools did not violate the Establishment Clause. District Judge Edward J. Schwartz approved the recommendation and entered a judgment of dismissal. This appeal followed.

DISCUSSION

A. Jurisdiction

Newdow asks the district court to order the President of the United States ("the President") to "alter, modify or repeal" the Pledge by removing the words "under God"; and to order the United States Congress ("Congress") "immediately to act to remove the words 'under God' from the Pledge." The President, however, is not an appropriate defendant in an action challenging the constitutionality of a federal statute. *See Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (plurality) (observing that a court of

the United States " 'has no jurisdiction of a bill to enjoin the President in the performance of his official duties' ") (quoting *Mississippi v. Johnson,* 71 U.S. 475 (1866)).

Similarly, in light of the Speech and Debate Clause of the Constitution, Art. I, § 6, cl. 1, the federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation. *See Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 503 (1975). Because the words that amended the Pledge were enacted into law by statute, the district court may not direct Congress to delete those words any more than it may order the President to take such action. All this, of course, is aside from the fact that the President has no authority to amend a statute or declare a law unconstitutional, those functions being reserved to Congress and the federal judiciary respectively.

Newdow nevertheless argues that because the 1954 Act violates the Establishment Clause, Congress should not be protected by the Speech and Debate Clause. This argument misses the jurisdictional, or separation of powers, point. As the Court held in *Eastland,* in determining whether or not the acts of members of Congress are protected by the Speech and Debate Clause, the court looks solely to whether or not the acts fall within the legitimate legislative sphere; if they do, Congress is protected by the absolute prohibition of the Clause against being "questioned in any other Place." *Id.* at 501. "If the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it." *Id.* at 508-09.

B. The State of California as a defendant

The State of California did not join in the motion to dismiss

or otherwise participate in the district court proceedings. It did, however, *sub silentio,* receive the benefit of the district court's ruling dismissing the complaint. Accordingly, a reversal of the order would result in the reinstatement of the complaint against the state. With respect to the validity of the California statute, however, unlike in the case of the Congressional enactment and the school district policy, no arguments, legal or otherwise, were advanced by the parties in the district court. Thus, we do not address separately the validity of the California statute.

C. Standing

Article III standing is a jurisdictional issue. *See United States v. Viltrakis,* 108 F.3d 1159, 1160 (9th Cir. 1997). Accordingly, it "may be raised at any stage of the proceedings, including for the first time on appeal." *See A-Z Intern. v. Phillips,* 179 F.3d 1187, 1190-91 (9th Cir. 1999). To satisfy standing requirements, a plaintiff must prove that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561 (1992)).

Newdow has standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter. "Parents have a right to direct the religious upbringing of their children and, on that basis, have standing to protect their right." *Doe v. Madison Sch. Dist. No. 321,* 177 F.3d 789, 795 (9th Cir. 1999) (en banc); *see also Grove v. Mead Sch. Dist. No. 354,* 753 F.2d 1528, 1532 (9th Cir. 1985) ("Appellants have standing to

challenge alleged violations of the establishment clause of the First Amendment if they are directly affected by use of [the challenged book] in the English curriculum. [Appellant] has standing as a parent whose right to direct the religious training of her child is allegedly affected.") (citation omitted).

Newdow has standing to challenge the EGUSD's policy and practice regarding the recitation of the Pledge because his daughter is currently enrolled in elementary school in the EGUSD. However, Newdow has no standing to challenge the SCUSD's policy and practice because his daughter is not currently a student there. The SCUSD and its superintendent have not caused Newdow or his daughter an "injury in fact" that is "actual or imminent, not conjectural or hypothetical." *Laidlaw,* 528 U.S. at 180 (citing *Lujan,* 504 U.S. at 560-561).

D. Establishment Clause

[1] The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion," U.S. Const. amend. I, a provision that "the Fourteenth Amendment makes applicable with full force to the States and their school districts." *Lee v. Weisman,* 505 U.S. 577, 580 (1992). Over the last three decades, the Supreme Court has used three interrelated tests to analyze alleged violations of the Establishment Clause in the realm of public education: the three-prong test set forth in *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971); the "endorsement" test, first articulated by Justice O'Connor in her concurring opinion in *Lynch v. Donnelly,* 465 U.S. 668 (1984), and later adopted by a majority of the Court in *County of Allegheny v. ACLU,* 492 U.S. 573 (1989); and the "coercion" test first used by the Court in *Lee.*

[2] In 1971, in the context of unconstitutional state aid to nonpublic schools, the Supreme Court in *Lemon* set forth the following test for evaluating alleged Establishment Clause violations. To survive the "*Lemon* test," the government conduct in question (1) must have a secular purpose, (2) must have a principal or primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive government entanglement with religion. *Lemon,* 403 U.S. at 612-13. The Supreme Court applied the *Lemon* test to every Establishment case it decided between 1971 and 1984, with the exception of *Marsh v. Chambers,* 463 U.S. 783 (1983), the case upholding legislative prayer.[3] *See Wallace,* 472 U.S. at 63 (Powell, J., concurring).

In the 1984 *Lynch* case, which upheld the inclusion of a nativity scene in a city's Christmas display, Justice O'Connor wrote a concurring opinion in order to suggest a "clarification" of Establishment Clause jurisprudence. 465 U.S. at 687 (O'Connor, J., concurring).

[3] Justice O'Connor's "endorsement" test effectively collapsed the first two prongs of the *Lemon* test:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political

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[3] In *Marsh,* the Court "held that the Nebraska Legislature's practice of opening each day's session with a prayer by a chaplain paid by the State did not violate the Establishment Clause of the First Amendment. [The] holding was based upon the historical acceptance of the practice that had become 'part of the fabric of our society.'" *Wallace,* 472 U.S. at 63 n. 4 (Powell, J., concurring) (quoting *Marsh,* 463 U.S. at 792).

> community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions . . . . The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Id. at 687-88 (O'Connor, J., concurring).

[4] The Court formulated the "coercion test" when it held unconstitutional the practice of including invocations and benedictions in the form of "nonsectarian" prayers at public school graduation ceremonies. *Lee,* 505 U.S. at 599. Declining to reconsider the validity of the *Lemon* test, the Court in *Lee* found it unnecessary to apply the *Lemon* test to find the challenged practices unconstitutional. *Id.* at 587. Rather, it relied on the principle that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith, or tends to do so." *Id.* (citations and internal quotation marks omitted). The Court first examined the degree of school involvement in the prayer, and found that "the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position." *Id.* at 590. The next issue the Court considered was "the position of the students, both those who desired the prayer and she who did not." *Id.* Noting that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in

the elementary and secondary public schools," *id.* at 592, the Court held that the school district's supervision and control of the graduation ceremony put impermissible pressure on students to participate in, or at least show respect during, the prayer, *id.* at 593. The Court concluded that primary and secondary school children may not be placed in the dilemma of either participating in a religious ceremony or protesting. *Id.* at 594.

Finally, in its most recent school prayer case, the Supreme Court applied the *Lemon* test, the endorsement test, and the coercion test to strike down a school district's policy of permitting student-led "invocations" before high school football games. *See Santa Fe,* 530 U.S. at 310-16. Citing *Lee,* the Court held that "the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship." *Id.* at 312. Applying the *Lemon* test, the Court found that the school district policy was facially unconstitutional because it did not have a secular purpose. *Id.* at 314-16. The Court also used language associated with the endorsement test. *Id.* at 315 ("[T]his policy was implemented with the purpose of endorsing school prayer."); *id.* at 317 ("Government efforts to endorse religion cannot evade constitutional reproach based solely on the remote possibility that those attempts may fail.").

[5] We are free to apply any or all of the three tests, and to invalidate any measure that fails any one of them. Because we conclude that the school district policy impermissibly coerces a religious act and accordingly hold the policy unconstitutional, we need not consider whether the policy fails the endorsement test or the *Lemon* test as well.

[6] In the context of the Pledge, the statement that the United States is a nation "under God" is a profession of a religious

belief, namely, a belief in monotheism. The recitation that ours is a nation "under God" is not a mere acknowledgment that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion in the founding of the Republic. Rather, the phrase "one nation under God" in the context of the Pledge is normative. To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since 1954—monotheism. A profession that we are a nation "under God" is identical, for Establishment Clause purposes, to a profession that we are a nation "under Jesus," a nation "under Vishnu," a nation "under Zeus," or a nation "under no god," because none of these professions can be neutral with respect to religion. The school district's practice of teacher-led recitation of the Pledge aims to inculcate in students a respect for the ideals set forth in the Pledge, including the religious values it incorporates.

The Supreme Court recognized the normative and ideological nature of the Pledge in *Barnette*, 319 U.S. 624. There, the Court held unconstitutional a school district's wartime policy of punishing students who refused to recite the Pledge and salute the flag. *Id.* at 642. The Court noted that the school district was compelling the students "to declare a belief," *id.* at 631, and "requir[ing] the individual to communicate by word and sign his acceptance of the political ideas [the flag] . . . bespeaks," *id.* at 633. "[T]he compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind." *Id.* The Court emphasized that the political concepts articulated in the Pledge [4] were idealistic, not

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[4] *Barnette* was decided before "under God" was added, and thus the Court's discussion was limited to the political ideals contained in the Pledge.

descriptive: " '[L]iberty and justice for all,' if it must be accepted as descriptive of the present order rather than an ideal, might to some seem an overstatement." *Id.* at 634 n.14. The Court concluded that: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

[7] The school district's policy here, like the school's action in *Lee*, places students in the untenable position of choosing between participating in an exercise with religious content or protesting. The defendants argue that the religious content of "one nation under God" is minimal. To an atheist or a believer in non-Judeo-Christian religions or philosophies, however, this phrase may reasonably appear to be an attempt to enforce a "religious orthodoxy" of monotheism, and is therefore impermissible. As the Court observed with respect to the graduation prayer in *Lee*: "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Lee*, 505 U.S. at 592.

[8] The coercive effect of the policy here is particularly pronounced in the school setting given the age and impressionability of schoolchildren, and their understanding that they are required to adhere to the norms set by their school, their

teacher and their fellow students.[5] Furthermore, under *Lee*, non-compulsory participation is no basis for distinguishing *Barnette* from the case at bar because, even without a recitation requirement for each child, the mere presence in the classroom every day as peers recite the statement "one nation under God" has a coercive effect.[6] The coercive effect of the Pledge is also made even more apparent when we consider the legislative history of the Act that introduced the phrase "under God." These words were designed to be recited daily in school classrooms. President Eisenhower, during the Act's signing ceremony, stated: "From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty." 100 Cong. Rec. 8618 (1954) (statement of Sen. Ferguson incorporating signing statement of President Eisenhower).[7] All in all, there can

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[5] The "subtle and indirect" social pressure which permeates the classroom also renders more acute the message sent to non-believing schoolchildren that they are outsiders. *See Lee*, 505 U.S. at 592-93 (stating that "the risk of indirect coercion" from prayer exercises is particularly "pronounced" in elementary and secondary public school because students are subjected to peer pressure and public pressure which is "as real as any overt compulsion").

[6] The objection to the Pledge in *Barnette*, like in the case at bar, was based upon a religious ground. The Pledge in the classroom context imposes upon schoolchildren the constitutionally unacceptable choice between participating and protesting. Recognizing the severity of the effect of this form of coercion on children, the Supreme Court in *Lee* stated, "the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position." 505 U.S. at 593.

[7] In addition, the legislative history of the 1954 Act makes it plain that the sponsors of the amendment knew about and capitalized on the state laws and school district rules that mandate recitation of the Pledge. The legislation's House sponsor, Representative Louis C. Rabaut, testified at the Congressional hearing

be little doubt that under the controlling Supreme Court cases the school district's policy fails the coercion test.[8]

The Supreme Court has addressed the Pledge in passing, and we owe due deference to its dicta. *See United States v. Baird*, 85 F.3d 450, 453 (9th Cir. 1996). Our opinion, however, is not inconsistent with this dicta. In *Allegheny*, the Court noted that it had "considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." 492 U.S. at 602-03. And in *Lynch*, the Court observed that students recited the pledge daily, but only to support its point that there is a long tradition of "official acknowledgment" of religion. 465 U.S. at 674, 676. Neither of these two references speaks to the issue here. We may assume *arguendo* that public officials do not unconstitutionally endorse religion when they recite the Pledge, yet it does not follow that schools may coerce impressionable young schoolchildren to recite it, or even to stand mute while it is

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that "the children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins." This statement was incorporated into the report of the House Judiciary Committee. H.R. Rep. No. 83-1693, at 3 (1954), *reprinted in* 1954 U.S.C.C.A.N 2339, 2341.

[8] In *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970), this court, without reaching the question of standing, upheld the inscription of the phrase "In God We Trust" on our coins and currency. *But cf. Wooley v. Maynard*, 430 U.S. 705, 722 (1977) (Rehnquist, J., dissenting) (stating that the majority's holding leads logically to the conclusion that "In God We Trust" is an unconstitutional affirmation of belief). In any event, *Aronow* is distinguishable in many ways from the present case. The most important distinction is that school children are not coerced into reciting or otherwise actively led to participating in an endorsement of the markings on the money in circulation.

being recited by their classmates.

Our decision is not inconsistent with *Engel*, which approved of encouraging students to "recit[e] historical documents such as the Declaration of Independence which contain references to the Deity or . . . sing[ ] officially espoused anthems which include the composer's professions of faith in a Supreme Being." 370 U.S. at 435 n.21. The Pledge differs from the Declaration and the anthem in that its reference to God, in textual and historical context, is not merely a reflection of the author's profession of faith. It is, by design, an affirmation by the person reciting it. "I pledge" is a performative statement. *See* J.L. Austin, *How to Do Things with Words* (J.O. Urmsson & Marina Sbisa eds., Harvard Univ. Press 1975) (1962). To pledge allegiance to something is to alter one's moral relationship to it, and not merely to repeat the words of an historical document or anthem.

The only other United States Court of Appeals to consider the issue is the Seventh Circuit, which held in *Sherman v. Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992), that a policy similar to the one before us regarding the recitation of the Pledge of Allegiance containing the words "one nation under God" was constitutional. The *Sherman* court first stated that:

> If as *Barnette* holds no state may require anyone to recite the Pledge, and if as the prayer cases hold the recitation by a teacher or rabbi of unwelcome words is coercion, then the Pledge of Allegiance becomes unconstitutional under all circumstances, just as no school may read from a holy scripture at the start of class.

980 F.2d at 444. It then concludes, however, that this reasoning is flawed because the First Amendment "[does] not establish general rules about speech or schools; [it] call[s] for religion to be treated differently." *Id.* We have some difficulty understanding this statement; we do not believe that the Constitution prohibits compulsory patriotism as in *Barnette*, but permits compulsory religion as in this case. If government endorsed religion is to be treated differently from government-endorsed patriotism, the treatment must be less favorable, not more.

The Seventh Circuit makes an even more serious error, however. It not only refuses to apply the *Lemon* test because of the Supreme Court's criticism of that test in *Lee*, but it also fails to apply the coercion test from *Lee*. Circuit courts are not free to ignore Supreme Court precedent in this manner. *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Instead of applying any of the tests announced by the Supreme Court, the Seventh Circuit simply frames the question as follows: "Must ceremonial references in civic life to a deity be understood as prayer, or support for all monotheistic religions, to the exclusion of atheists and those who worship multiple gods?" 980 F.2d at 445. For the reasons we have already explained, this question is simply not dispositive of whether the school district policy impermissibly coerces a religious act.

[9] In light of Supreme Court precedent, we hold that the school district's policy and practice of teacher-led recitation of the Pledge, with the inclusion of the added words "under God," violates the Establishment Clause.

In addition to the relief that Newdow seeks against the school district—relief to which he is entitled—Newdow seeks a declaration as to the constitutionality of the 1954 Act. The district court did not discuss that question because it dismissed Newdow's complaint on the basis of its holding that the school district's policy did not violate the First Amendment. Given our contrary holding, we must consider whether to grant Newdow's claim for declaratory relief as to the Act. Normally, whether to decide a claim for declaratory judgment is left to the discretion of the district court. 28 U.S.C. § 2201(a); *see also Government Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1222-23 (9th Cir. 1998). We doubt that, given the relief to which we decide Newdow is entitled, the district court would have exercised its discretionary power to resolve, in the present case, the additional issue as to which Newdow seeks declaratory relief. Accordingly, we decline to reach that issue here.

[10] The judgment of dismissal is vacated with respect to Newdow's claim that the school district's Pledge policy violates the Establishment Clause and the cause is remanded for further proceedings consistent with our holding. Plaintiff is to recover costs on this appeal.

REVERSED AND REMANDED.

FERNANDEZ, Circuit Judge, concurring and dissenting:

I concur in parts A, B and C of the majority opinion, but dissent as to part D.

We are asked to hold that inclusion of the phrase "under God" in this nation's Pledge of Allegiance violates the religion clauses of the Constitution of the United States. We should do no

such thing. We should, instead, recognize that those clauses were not designed to drive religious expression out of public thought; they were written to avoid discrimination.[1]

We can run through some or all of the tests and concepts which have floated to the surface from time to time. Were we to do so, the one that appeals most to me, the one I think to be correct, is the concept that what the religion clauses of the First Amendment require is neutrality; that those clauses are, in effect, an early kind of equal protection provision and assure that government will neither discriminate for nor discriminate against a religion or religions. *See Gentala v. City of Tucson*, 244 F.3d 1065, 1083-86 (9th Cir.) (en banc) (Fernandez, J., dissenting), *cert. granted and judgment vacated by* 534, U.S. 946, 122 S. Ct. 340, 151 L. Ed. 2d 256 (2001); *Goehring v. Brophy*, 94 F.3d 1294, 1306-07 (9th Cir. 1996) (Fernandez, J., concurring). But, legal world abstractions and ruminations aside, when all is said and done, the danger that "under God" in our Pledge of Allegiance will tend to bring about a theocracy or suppress somebody's beliefs is so minuscule as to be de minimis. The danger that phrase presents to our First Amendment-freedoms is picayune at most.

Judges, including Supreme Court Justices, have recognized the lack of danger in that and similar expressions for decades, if

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[1] Although the majority now formally limits itself to holding that it is unconstitutional to recite the Pledge in public classrooms, its message that something is constitutionally infirm about the Pledge itself abides and remains a clear and present danger to all similar public expressions of reverence. At the very least, it deprives children in public schools of the benefits derived from those expressions.

not for centuries, as have presidents [2] and members of our Congress. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 602-03, 672-73, 109 S. Ct. 3086, 3106, 3143, 106 L. Ed. 2d 472 (1989); *Wallace v. Jaffree*, 472 U.S. 38, 78 n.5, 105 S. Ct. 2479, 2501 n.5, 86 L. Ed. 2d 29 (1985); *Lynch v. Donnelly*, 465 U.S. 668, 676, 693, 716, 104 S. Ct. 1355, 1361, 1369, 1382, 79 L. Ed. 2d 604 (1984); *Abington Sch. Dist. v.Schempp*, 374 U.S. 203, 306-08, 83 S. Ct. 1560, 1615-16, 10 L. Ed. 2d 844 (1963);[3] *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 622 (9th Cir. 1996) (O'Scannlain, J., concurring); *Gaylor v. United States*, 74 F.3d 214, 217-18 (10th Cir. 1996); *Sherman v. Cmty Consol. Sch. Dist. 21*, 980 F.2d 437, 445-48 (7th Cir. 1992); *O'Hair v. Murray*, 588 F.2d 1144, 1144 (5th Cir. 1978) (per curiam); *Aronow v. United States*, 432 F.2d 242, 243-44 (9th Cir. 1970); *cf. Marsh v. Chambers*, 463 U.S. 783, 795, 103 S. Ct. 3330, 3338, 77 L. Ed. 2d 1019 (1983) (legislative prayer). I think it is worth stating a little more about two of the cases which I have just cited. In *County of Allegheny*, 492 U.S. at 602-03, 109 S. Ct. at 3106, the Supreme Court had this to say: "Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent

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[2] *See, e.g., Lee v. Weisman*, 505 U.S. 577, 632-35, 112 S. Ct. 2649, 2679-80, 120 L. Ed. 2d 467 (1992) (Scalia, J., dissenting).

[3] The citations to the four preceding Supreme Court opinions are to majority opinions, concurring opinions, and dissents. Because my point is that a number of Justices have recognized the lack of danger and because I hope to avoid untoward complication in the setting out of the citations, I have not designated which Justices have joined in which opinion. All in all, however, perusing those opinions indicates that Chief Justice Burger, Chief Justice Rehnquist, and Justices Harlan, Brennan, White, Goldberg, Marshall, Blackmun, Powell, Stevens, O'Connor, Scalia, and Kennedy have so recognized.

with the proposition that government may not communicate an endorsement of religious belief." The Seventh Circuit, reacting in part to that statement, has wisely expressed the following thought:

> Plaintiffs observe that the Court sometimes changes its tune when it confronts a subject directly. True enough, but an inferior court had best respect what the majority says rather than read between the lines. If the Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so.

Sherman, 980 F.2d at 448.

Some, who rather choke on the notion of de minimis, have resorted to the euphemism "ceremonial deism." *See, e.g., Lynch*, 465 U.S. at 716, 104 S. Ct. at 1382 (Brennan, J., dissenting). But whatever it is called (I care not), it comes to this: such phrases as "In God We Trust," or "under God" have no tendency to establish a religion in this country or to suppress anyone's exercise, or non-exercise, of religion, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity. Those expressions have not caused any real harm of that sort over the years since 1791, and are not likely to do so in the future.[4] As I see it, that is not because they are

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[4] They have not led us down the long path to kulturkampf or worse. Those who are somehow beset by residual doubts and fears should find comfort in the reflection that no baleful religious effects have been generated by the existence of similar references to a deity throughout our history. More specifically, it is difficult to detect any signs of incipient theocracy springing up since the Pledge was amended in 1954.

drained of meaning.[5] Rather, as I have already indicated, it is because their tendency to establish religion (or affect its exercise) is exiguous. I recognize that some people may not feel good about hearing the phrases recited in their presence, but, then, others might not feel good if they are omitted. At any rate, the Constitution is a practical and balanced charter for the just governance of a free people in a vast territory. Thus, although we do feel good when we contemplate the effects of its inspiring phrasing and majestic promises, it is not primarily a feel-good prescription.[6] In *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 630, 642, 63 S. Ct. 1178, 1181, 1187, 87 L. Ed. 1628 (1943), for example, the Supreme Court did not say that the Pledge could not be recited in the presence of Jehovah's Witness children; it merely said that they did not have to recite it.[7] That fully protected their constitutional rights by precluding the government from trenching upon "the sphere of intellect and spirit." *Id.* at 642, 63 S. Ct. at 1187. As the Court pointed out, their

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[5] *See also Sherman*, 980 F.2d at 448 (Manion, J., concurring) ("A civic reference to God does not become permissible . . . only when . . . it is sapped of religious significance." The Pledge is constitutional and "[w]e need not drain the meaning from the reference [to God] to reach this conclusion."

[6] We, by the way, indicated as much in *American Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1125-26 (9th Cir. 2002), which involved governmental conduct that was much more questionable than adoption of the phrase "under God." *See id.* at 1126-28 (Noonan, J., dissenting).

[7] I recognize that the Pledge did not then contain the phrase "under God."

religiously based refusal "to participate in the ceremony [would] not interfere with or deny rights of others to do so." *Id.* at 630, 63 S. Ct. at 1181. We should not permit Newdow's feel-good concept to change that balance.

My reading of the stelliscript suggests that upon Newdow's theory of our Constitution, accepted by my colleagues today, we will soon find ourselves prohibited from using our album of patriotic songs in many public settings. "God Bless America" and "America The Beautiful" will be gone for sure, and while use of the first three stanzas of "The Star Spangled Banner" will still be permissible, we will be precluded from straying into the fourth.[8] And currency beware! Judges can accept those results if they limit themselves to elements and tests, while failing to look at the good sense and principles that animated those tests in the first place. But they do so at the price of removing a vestige of the awe all of us, including our children, must feel at the immenseness of the universe and our own small place within it, as well as the wonder we must feel at the good fortune of our country. That will cool the febrile nerves of a few at the cost of removing the healthy glow conferred upon many citizens when the forbidden verses, or phrases, are uttered, read, or seen.

In short, I cannot accept the eliding of the simple phrase "under God" from our Pledge of Allegiance in any setting, when it is obvious that its tendency to establish religion in this country or to interfere with the free exercise (or non-exercise) of religion is de

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[8] Nor will we be able to stray into the fourth stanza of "My Country 'Tis of Thee" for that matter.

minimis.[9]

Thus, I respectfully concur in part and dissent in part.

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[9] Lest I be misunderstood, I must emphasize that to decide this case it is not necessary to say, and I do not say, that there is such a thing as a de minimis constitutional violation. What I do say is that the de minimis tendency of the Pledge to establish a religion or to interfere with its free exercise is no constitutional violation at all. By the way, I am not the first to apply the de minimis concept to this area of the law. *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 861, 120 S. Ct. 2530, 2569, 147 L. Ed. 2d 660 (2000) (O'Connor, J., concurring) (evidence of improper use of funds was de minimis and did not affect constitutional inquiry); *Lee v. Weisman*, 505 U.S. 577, 630-31, 112 S. Ct. 2649, 2678, 120 L. Ed. 2d 467 (1992 (Souter, J. concurring) (establishment case; Madison recognized there is a difference between trivial and serious in constitutional practice, and pointed to the legal aphorism de minimis); *Lynch v. Donnelly*, 465 U.S. 668, 678, 104 S. Ct. 1355, 1361-62, 79 L. Ed. 2d 604 (1984) (not all government conduct which gives special recognition to religion is unconstitutional; where the benefit is indirect or remote, it is not unconstitutional); *School District of Abington v. Schempp*, 374 U.S. 203, 308, 83 S. Ct. 1560, 1616, 10 L. Ed. 2d 844 (1963) (Goldburg, J., concurring) ("the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow."); *Rapier v. Harris*, 172 F.3d 999, 1006 n.4 (7th Cir. 1999) ("De minimis burdens on free exercise are not of constitutional dimension); *Van Zandt v. Thompson*, 839 F.2d 1215, 1222 (7th Cir. 1988) (legislative prayer room would have a de minimis effect on advancement of religion); *Walsh v. La. High Sch. Athletic Ass'n*, 616 F.2d 152, 158 (5th Cir. 1980) (de minimis burden on free exercise results in rejection of First Amendment challenge); *Marsa v. Wernik*, 430 A.2d 888, 899 (N.J. 1981) (in an establishment case where impact of practice de minimis, it is unobjectionable); *see also Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 288-89 (4th Cir. 1998) (if a genuine threat of establishing religion becomes apparent, it is soon enough to address the issue).

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL A. NEWDOW,
Plaintiff-Appellant,

v.

US CONGRESS; UNITED STATES OF AMERICA; WILLIAM JEFFERSON CLINTON, President of the United States; STATE OF CALIFORNIA; ELK GROVE UNIFIED SCHOOL DISTRICT; DAVID W. GORDON, Superintendent EGUSD; SACRAMENTO CITY UNIFIED SCHOOL DISTRICT; JIM SWEENEY, Superintendent SCUSD,
Defendants-Appellees.

No. 00-16423

D.C. No.
CV-00-00495-
MLS/PAN

OPINION

Appeal from the United States District Court
for the Eastern District of California
Edward J. Schwartz, Senior Judge, Presiding

Argued and Submitted
March 14, 2002–San Francisco, California

Filed June 26, 2002

Before: Alfred T. Goodwin, Stephen Reinhardt and

Ferdinand F. Fernandez, Circuit Judges

Opinion by Judge Goodwin,
Partial Concurrence and Partial Dissent by Judge Fernandez

COUNSEL

Michael Newdow, Pro Se, Sacramento, California, the plaintiff-appellant.

Kristin S. Door, Assistant United States Attorney, Sacramento, California, Lowell V. Sturgill, Jr., Department of Justice, Washington, D.C., for federal government defendants-appellees; A. Irving Scott, Terence J. Cassidy, Porter, Scott, Weiberg & Delehant, Sacramento, California, for school district defendants-appellees.

OPINION

GOODWIN, Circuit Judge:

Michael Newdow appeals a judgment dismissing his challenge to the constitutionality of the words "under God" in the Pledge of Allegiance to the Flag. Newdow argues that the addition of these words by a 1954 federal statute to the previous version of the Pledge of Allegiance (which made no reference to God) and the daily recitation in the classroom of the Pledge of Allegiance, with the added words included, by his daughter's public school teacher are violations of the Establishment Clause of the First Amendment to the United States Constitution.

FACTUAL AND PROCEDURAL BACKGROUND

Newdow is an atheist whose daughter attends public elementary school in the Elk Grove Unified School District ("EGUSD") in California. In accordance with state law and a school district rule, EGUSD teachers begin each school day by leading their students in a recitation of the Pledge of Allegiance ("the Pledge"). The California Education Code requires that public schools begin each school day with "appropriate patriotic exercises" and that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy" this requirement. Cal. Educ. Code § 52720 (1989) (hereinafter "California statute").[1] To implement the California statute, the school district that Newdow's daughter attends has promulgated a policy that states, in pertinent part: "Each elementary school class [shall] recite the pledge of allegiance to the flag once each day."[2]

The classmates of Newdow's daughter in the EGUSD are led by their teacher in reciting the Pledge codified in federal law.

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[1] The relevant portion of the California Education Code § 525720 reads:

> In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally being the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.

[2] The SCUSD, the school district that Newdow claims his daughter may in the future attend, has promulgated a similar rule: "Each school shall conduct patriotic exercises daily . . . The Pledge of Allegiance to the flag will fulfill this requirement." However, as discussed *infra*, Newdow lacks standing to challenge the SCUSD's rule requiring recitation of the Pledge.

On June 22, 1942, Congress first codified the Pledge as "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation, indivisible, with liberty and justice for all." Pub. L. No 623, Ch. 435, § 7, 56 Stat. 380 (1942) (codified at 36 U.S.C. § 1972). On June 14, 1954, Congress amended Section 1972 to add the words "under God" after the word "Nation." Pub. L. No. 396, Ch. 297, 68 Stat. 249 (1954) ("1954 Act"). The Pledge is currently codified as "I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all." 4 U.S.C. § 4 (1998) (Title 36 was revised and recodified by Pub. L. No. 105-225, § 2(a), 112 Stat. 1494 (1998). Section 172 was abolished, and the Pledge is now found in Title 4.)

Newdow does not allege that his daughter's teacher or school district requires his daughter to participate in reciting the Pledge.[3] Rather, he claims that his daughter is injured when she is compelled to "watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's [sic] is 'one nature under God.'"

Newdow's complaint in the district court challenged the constitutionality, under the First Amendment, of the 1954 Act, the California statute, and the school district's policy requiring teachers

[3] Compelling students to recite the Pledge was held to be a First Amendment violation in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) ("[T]he action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which is the purpose of the First Amendment to our Constitution to reserve from all official control.") *Barnette* was decided before the 1954 Act added the words "under God" to the Pledge.

to lead willing students in recitation of the Pledge. He sought declaratory and injunctive relief, but did not seek damages.

The school districts and their superintendents (collectively, "school district defendants") filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim. Magistrate Judge Peter A. Nowinski held a hearing at which the school district defendants requested that the court rule only on the constitutionality of the Pledge, and defer any ruling on sovereign immunity. The United States Congress, the United States, and the President of the United States (collectively, "the federal defendants") joined in the motion to dismiss filed by the school district defendants. The magistrate judge reported findings and a recommendation; the District Judge Edward J. Schwartz approved the recommendation and entered a judgment of dismissal. This appeal followed.

DISCUSSION

A. Jurisdiction

Newdow asks the district court to order the President of the United States ("the President") to "alter, modify or repeal" the Pledge by removing the words "under God"; and to order the United States Congress ("Congress") "immediately to act to remove the words 'under God' from the Pledge." The President, however, is not an appropriate defendant in an action challenging the constitutionality of a federal statute. *See Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992)(plurality) (observing that a court of the United States "'has no jurisdiction of a bill to enjoin the President in the performance of his official duties'") (quoting *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866)).

Similarly, in light of the Speech and Debate Clause of the Constitution, Art. I § 6, cl. 1, the federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation. *See Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975). Because the words that amended the Pledge were enacted in to law by statute, the district court may not direct Congress to delete those words any more than it may order the President to take such action. All this, of course, is aside from the fact that the President has no authority to amend a statute or declare a law unconstitutional, those functions being reserved to Congress and the federal judiciary respectively.

Newdow nevertheless argues that because the 1954 Act violates the Establishment Clause, Congress should not be protected by the Speech and Debate Clause. This argument misses the jurisdictional, or separation of powers, point. As the Court held in *Eastland*, in determining whether or not the acts of members of Congress are protected by the Speech and Debate Clause, the court looks solely to whether or not the acts fall within the legitimate legislative sphere; if they do, Congress is protected by the absolute prohibition of the Clause against being "questioned in any other Place." *Id.* at 508-09. Although the district court lacks jurisdiction over the President and the Congress, the question of the constitutionality of the 1954 Act remains before us. While the court correctly dismissed the claim against those parties, it survives against others.

B. The State of California as a defendant

The State of California did not join in the motion to dismiss or otherwise participate in the district court proceedings. It did, however, *sub silentio*, receive the benefit of the district court's ruling dismissing the complaint. Accordingly, a reversal of the

order would result in the reinstatement of the complaint against the state. With respect to the validity of the California statute, however, unlike in the case of the Congressional enactment and the school district policy, no arguments, legal or otherwise, were advanced by the parties either below or here. Thus, we do not address separately the validity of the California statute.

C. Standing

Article III standing is a jurisdictional issue. *See United States v. Viltrakis*, 108 F. 3d 1159, 1160 (9th Cir. 1997). Accordingly, it "may be raised at any stage of the proceedings, including for the first time on appeal." *See A-Z Intern. V. Phillips*, 179, F.3d 1187, 1190-91 (9th Cir. 1999). To satisfy standing requirements, a plaintiff must prove that "(1) it has suffered and 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)).

Newdow has standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter. "Parents have a right to direct the religious upbringing of their children and, on that basis, have standing to protect their right." *Doe v. Madison Sch. Dist. No 321*, 177 F.3d 789, 795 (9th Cir. 1999) (en banc); *see also Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir. 1985) ("Appellants have standing to challenge alleged violations of the establishment clause of the First Amendment if they are directly affected by use of [the challenged

book] in the English curriculum. [Appellant] has standing as a parent whose right to direct the religious training of her child is allegedly affected.") (citation omitted).

Newdow has standing to challenge the EGUSD's policy and practice regarding the recitation of the Pledge because his daughter is currently enrolled in elementary school in the EGUSD. However, Newdow has no standing to challenge the SCUSD's policy and practice because his daughter is not currently a student there. SCUSD and its superintendent have not caused Newdow or his daughter an "injury in fact" that is "actual or imminent, not conjectural or hypothetical." *Laidlaw*, 528 U.S. at 180 (citing *Lujan*, 504 U.S. at 560-561).

The final question of standing relates to the 1954 Act. Specifically, has Newdow suffered an "injury in fact" that is "fairly traceable to the enactment of the 1954 Act? *Id.*

We begin our inquiry by noting the general rule that the standing requirements for an action brought under the Establishment Clause are the same as for any other action. *Valley Forge Christian Coll. V. Americans Untied for Separation of Church and State, Inc.*, 454 U.S. 464, 488-90 (1982). "The requirement of standing focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. Moreover, we know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing which might permit respondents to invoke the judicial power of the United States." *Id.* at 484 (citation and internal quotation marks omitted). In *Valley Forge*, an organization dedicated to the separation of church and state brought suit challenging the federal government's grant of surplus federal property to a church-related college. The suit alleged that

this grant of real property, without any financial payment by the college, was a violation of the Establishment Clause. The Supreme Court found that the plaintiff had standing neither as a taxpayer, *see id.* at 479-80, nor as a party personally injured as a consequence of the alleged unconstitutional action, *see id.* at 484-86. The "psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." *Id.* at 485-86. The Court emphasized that " '[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.'" *Id.* at 489 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)).

While *Valley Forge* remains good law, the Supreme Court in more recent opinions has indirectly broadened the notion of Establishment Clause standing in public education cases by holding that the mere enactment of a statute may constitute an Establishment Clause violation. In *Wallace v. Jaffree*, 472 U.S. 38 (1985), the Court considered an Establishment Clause challenge to an Alabama statute that originally had authorized a one-minute period of silence in public schools "for meditation," but was later amended to authorize a period of silence "for meditation or voluntary prayer." *Id.* at 40-42. Although the previous form of the statute specifically allowed students to use the moment of silence for "meditation," silent prayer was always an option. "[I]t is undisputed that at the time of the enactment of the [amended statute] there was no governmental practice impeding students from silently praying for one minute at the beginning of each schoolday." *Id.* at 57 n.45. Nor were students, under the amended form of the statute, compelled to use the allotted time for prayer. In sum, the amendment to the Alabama statute had no discernible effect on public school students other than to inform them that the

state was encouraging them to engage in prayer during their daily moment of silence. Because the Supreme Court has repeatedly held that standing is a jurisdictional requirement, the existence of which each federal court must determine for itself, *see Lujan*, 504 U.S. at 559-561; *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990), we may presume that in *Wallace* the Court examined the standing question before deciding on the merits, and that the Court determined that the schoolchildren's parents had standing to challenge the amended Alabama statute.

Our reading of *Wallace* is supported by *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), where the Court upheld a facial challenge to a school district's policy of permitting, but not requiring, prayer initiated and led by a student at high school football games. Noting that "the Constitution also requires that we keep in mind 'the myriad, subtle ways in which the Establishment Clause values can be eroded,'" *id.* at 314 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring)), the Court held that the "mere passage by the District of a policy that has the purpose and perception of government establishment of religion," *id.*, violated the Establishment Clause. "[T]he *simple enactment* of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation." *Id.* at 316 (emphasis added).

In *Wallace* and *Santa Fe*, the Court looked at the language of each statute, the context in which the statute was enacted, and its legislative history to determine that the challenged statute caused an injury in violation of the Establishment Clause. "We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented

with the purpose of endorsing school prayer." *Id.* at 315. Justice O'Connor's concurrence in *Wallace* noted that whether a statute actually conveys a message of endorsement of religion is "not entirely a question of fact . . . The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as state endorsement of prayer in public schools." 472 U.S. at 76 (O'Connor, J., concurring in judgment). In *Santa Fe*, "[t]he text and history of this policy . . . reinforce our objective student's perception that the prayer is, in actuality, encouraged by the school." 530 U.S. 308. In evaluating the purpose of the school district policy, the Court found "most striking . . . the evolution of the current policy." *Id.* at 309. In *Wallace*, a review of the legislative history led the Court to conclude that enactment of the amended statute "was not motivated by any clearly secular purpose — indeed, the statute had *no* secular purpose." 472 U.S. at 56; *see also id.* at 57-60.

Operating within the above-described legal landscapes, we now turn to the question initially posed, namely, does Newdow have standing to challenge the 1954 Act? Initially, we note that the 1954 statute challenged by Newdow is similar to the Alabama statute struck down in *Wallace*. Neither statute works the traditional type of "injury in fact" that is implicated when a statute compels or prohibits certain activity, nor do the amendments brought about by these statutes lend themselves to "as-applied" constitutional review. Nevertheless, the Court in *Wallace*, at least implicitly, determined that the schoolchildren's parents had standing to attack the challenged statute. Moreover, the legislative history of the 1954 Act shows that the "under God" language was not meant to sit passively in the federal code unbeknownst to the public; rather, the sponsors of the amendment knew about and capitalized on the state laws and school district rules that mandate

recitation of the Pledge. The legislation's House sponsor, Representative Louis C. Rabaut, testified at the Congressional hearing the "the children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and it origins," and this statement was incorporated into the report of the House Judiciary Committee. H.R. Rep. No. 83-1693, at 3 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2341. Taken within its context, the 1954 addendum was designed to result in the recitation of the words "under God" in school classrooms throughout the land on a daily basis, and therefore constituted as much of an injury-in-fact as the policies considered in *Wallace* and *Santa Fe*. As discussed earlier, Newdow has standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter. The mere enactment of the 1954 Act in its particular context constitutes a religious recitation policy that interferes with Newdow's right to direct the religious education of his daughter. Accordingly, we hold that Newdow has standing to challenge the 1954 Act.

D. Establishment Clause

[1] The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion," U.S. Cpnst. amend. I, a provision that "the Fourteenth Amendment makes applicable with full force to the States and their school districts." *Lee v. Weisman*, 505 U.S. 577, 580 (1992). Over the last three decades, the Supreme Court has used three interrelated tests to analyze alleged violations of the Establishment Clause in the realm of public education: the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612,13 (1971); the "endorsement test, first articulated by Justice O'Connor in her concurring opinion in *Lynch*, and later adopted by

a majority of the Count in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) and the "coercion" test first used by the Court in *Lee*.

[2] In 1971, in the context of unconstitutional state aid to nonpublic schools, the Supreme Court in *Lemon* set forth the following test for evaluating alleged Establishment Clause violations. To survive the "*Lemon* test," the government conduct in question (1) must have a secular purpose, (2) must have a principal or primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13. The Supreme Court applied the *Lemon* test to every Establishment case it decided between 1971 and 1984, with the exception of *Marsh v. Chambers*, 463 U.S. 783 (1983), the case upholding legislative prayer.[4] *See Wallace*, 472 U.S. at 63 (Powell, J., concurring).

In the 1994 Lynch case, which upheld the inclusion of a nativity scene in a city's Christmas display, Justice O'Connor wrote a concurring opinion in order to suggest a "clarification" of Establishment Clause jurisprudence. 465 U.S. at 687 (O'Connor, J., concurring). Justice O'Connor's "endorsement" test effectively collapsed the first two prongs of the *Lemon* test:

> The establishment Clause prohibits government from making adherence to a religion relevant in

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[4] In *Marsh*, the Court "held that the Nebraska Legislature's practice of opening each day's session with a prayer by a chaplain paid by the State did not violate the Establishment Clause of the First Amendment. [The] holding was based upon the historical acceptance of the practice that had become 'part of the fabric of our society.'" *Wallace*, 472 U.S. at 63 n.4 (Powell, J., concurring) (quoting *Marsh*, 463 U.S. at 792).

> any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions . . . The second and more direct infringement is a government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Id. at 687-88 (O'Connor, J., concurring).

[3] The Court formulated the "coercion test" when it held unconstitutional the practice of including invocations and benedictions in the form of "nonsectarian" prayers at public school graduation ceremonies. *Lee*, 505 U.S. at 599. Declining to reconsider the validity of the *Lemon* test to find the challenged practices unconstitutional, the Court in *Lee* found it unnecessary to apply the *Lemon* test to find the challenged practices unconstitutional. *Id.* at 587. Rather, it relied on the principle that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith, or tends to do so." *Id.* (citations and internal quotation marks omitted).[5] The Court first examined the

[5] Although this formulation is referred to as the "coercion" test, it should be noted that coercion is not a *necessary* element in finding an Establishment Clause violation. "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion . . . ." *Engle v. Vitale*, 370 U.S. 421, 430 (1962). "[T]his court has never relied on coercion alone as the touchstone of Establishment Clause analysis. To require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the free Exercise Clause a redundancy." *Allegheny*, 492 U.S. at 628 (O'Connor, J., concurring). "Over the years, this Court has declared the invalidity of many noncoercive state laws and practices conveying a message of religious endorsement." *Lee*, 505 U.S. at 618 (Souter, J., concurring.)

degree of school involvement in prayer, and found that "the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position." *Id.* at 590. The next issue the Court considered was "the position of the students, both those who desired the prayer and she who did not." *Id.* Noting that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools," *id.* at 592, the Court held that the school district's supervision and control of the graduation ceremony put impermissible pressure on students to participate in, or at least show respect during, the prayer, *id.* at 593. The Court concluded that primary and secondary school children may not be placed in the dilemma of either participating in a religious ceremony or protesting. *Id.* at 594.

Finally, in its most recent school prayer case, the Supreme Court applied the *Lemon* test, the endorsement test, and the coercion test to strike down a school district's policy of permitting student-led "invocations" before high school football games, *See Santa Fe*, 530 U.S. at 310-16. Citing *Lee*, the Court held that "the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship." *Id.* at 312. Applying the *Lemon* test, the Court found that the school

district policy was facially unconstitutional because it did not have a secular purpose. *Id.* at 314-16. The Court also used language associated with the endorsement test. *Id.* at 315 ("[T]his policy was implemented with the purpose of endorsing school prayer."); *id.* at 317 ("Government efforts to endorse religion cannot evade constitutional reproach based solely on the remote possibility that those attempts may fail.").

We are free to apply any or all of the three tests, and to invalidate any measure that fails any one of them. The Supreme Court has not repudiated *Lemon*; in *Santa Fe*, it found that the application of each of the three tests provided an independent ground for invalidating the statute at issue in that case; and in *Lee*, the Court invalidated the policy solely on the basis of the coercion test. Although this court has typically applied the *Lemon* test to alleged Establishment Clause violations, *see, e.g., Am. Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1120-21 (9th Cir. 2002), we are not required to apply it if a practice fails one of the other tests. Nevertheless, for purposes of completeness, we will analyze the school district policy and the 1954 Act under all three tests.

We first consider whether the 1954 Act and the EGUSD's policy of teacher-led Pledge recitation survive the endorsement test. The magistrate judge found that "the ceremonial reference to God in the pledge does not convey endorsement of particular religious beliefs." Supreme Court precedent does not support that conclusion.

[4] In the context of the Pledge, the statement that the United States is a nation "under God" is an endorsement of religion. It is a profession of a religious belief, namely, a belief in monotheism. The recitation that ours is a nation "under God" is

not a mere acknowledgment that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion in the founding of the Republic. Rather, the phrase "one nation under God" in the context of the Pledge is normative. To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty justice and – since 1954 – monotheism. The text of the official Pledge, codified in federal law, impermissibly takes a position with respect to the purely religious question of the existence and identity of God. A profession that we are a nation "under God" is identical, for Establishment Clause purposes, to a profession that we are a nation "under Jesus," a nation "under Vishnu," a nation "under Zeus," or a nation "under no god," because none of these professions can be neutral with respect to religion. "[T]he government must pursue a course of complete neutrality toward religion." *Wallace*, 472 U.S. at 60. Furthermore, the school district's practice of teacher-led recitation of the Pledge aims to inculcate in students a respect for the ideals set forth in the Pledge, and thus amounts to state endorsement of these ideals. Although students cannot be forced to participate in recitation of the Pledge, the school district is nonetheless conveying a message of state endorsement of a religious belief when it requires public school teachers to recite, and lead the recitation of, the current form of the Pledge.

The Supreme Court recognized the normative and ideological nature of the Pledge in *Barnette*, 319 U.S. 624. There, the Court held unconstitutional a school district's wartime policy of punishing students who refused to recite the Pledge and salute the flag. *Id.* at 642. The Court noted that the school district was compelling the students "to declare a belief," *id.* at 631, and "requir[ing] the individual to communicate by word and sign his

acceptance of the political ideas [the flag] . . . . bespeaks," *id.* at 633. "[T]he compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind." *Id.* The Court emphasized that the political concepts articulated in the Pledge[6] were idealistic, not descriptive: "'[L]iberty and justice for all,' if it must be accepted as descriptive of the present order rather than an ideal, might to some seem an overstatement." *Id.* at 634 n.14. The Court concluded that: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

[5] The Pledge, as currently codified, is an impermissible government endorsement of religion because it sends a message to unbelievers "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). Justice Kennedy, in his dissent in *Allegheny*, agreed:

> [B]y statute, the Pledge of Allegiance to the Flag describes the United States as 'one nation under God.' To be sure, no one is obligated to recite this phrase, . . . but it borders on sophistry to suggest that the reasonable atheist would not feel less than a full member of the political community every time his fellow Americans recited, as part of their expression of patriotism and love for country, a

[6] *Barnette* was decided before "under God" was added, and thus the Court's discussion was limited to the political ideals contained in the Pledge.

phrase he believed to be false.

Allegheny, 492 U.S. at 672 (Kennedy, J., dissenting)(citations and internal quotation marks omitted).[7] Consequently, the policy and the Act fail the endorsement test.

[6] Similarly, the policy and the Act fail the coercion test. Just as in *Lee*, the policy and the Act place students in the untenable position of choosing between participating in an exercise with religious content or protesting. As the Court observed with respect to the graduation prayer in that case: "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Lee*, 505 U.S. at 592. Although the defendants argue that the religious content of "one nation under God" is minimal, to an atheist or a believer in certain non-Judeo-Christian religions or philosophies, it may reasonably appear to be an attempt to enforce a "religious orthodoxy" of monotheism, and is therefore impermissible. The coercive effect of this policy is particularly pronounced in the school setting given the age and impressionability of school children, and their understanding that they are required to adhere to the norms set by their school, their teacher and their fellow students.[8] Furthermore, under *Lee*, the

[7] For Justice Kennedy, this result was a reason to reject the endorsement test.

[8] The "subtle and indirect" social pressure which permeates the classroom also renders more acute the message sent to non-believing school-children that they are outsiders. *See Lee*, 505 U.S. at 592-93 (stating that "the risk

fact that students are not required to participate is no basis for distinguishing *Barnette* from the case at bar because, even without a recitation requirement for each child, the mere fact that a pupil is required to listen every day to the statement "one nation under God" has a coercive effect.[9] The coercive effect of the Act is apparent from its context and legislative history, which indicate that the Act was designed to result in the daily recitation of the words "under God" in school classrooms. President Eisenhower, during the Act's signing ceremony, stated: "From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty." 100 Cong. Rec. 8618 (1954) (statement of Sen Ferguson incorporating signing statement of President Eisenhower). Therefore, the policy and the Act fail the coercion test.[10]

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of indirect coercion" from prayer exercises is particularly "pronounced" in elementary and secondary public school because students are subjected to peer pressure and public pressure which is "as real as any overt compulsion").

[9] The objection to the Pledge in *Barnette*, like in the case at bar, was based upon a religious ground. The Pledge in the classroom context imposes upon schoolchildren the constitutionally unacceptable choice between participating and protesting. Recognizing the severity of the effect of this form of coercion on children, the Supreme Court in *Lee* stated, "the State may not, consistent with the Establishment Clause, place primary and scondary school children in this position." 505 U.S. at 593.

[10] In *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970), this court, without reaching the question of standing, upheld the inscription of the phrase "In God We Trust" on our coins and currency. *But cf. Wooley v. Maynard*, 430 U.S. 705, 722 (1977) (Rehnquist, J., dissenting) (stating that the majority's holding leads logically to the conclusion that "In God We Trust" is an unconstitutional affirmation of belief). In any event, *Aronow* is distinguishable in many ways from the present case. The most important distinction is that

Finally we turn to the *Lemon* test, the first prong of which asks if the challenged policy has a secular purpose. Historically, the primary purpose of the 1954 Act was to advance religion, in conflict with the first prong of the *Lemon* test. The federal defendants "do not dispute that the words 'under God' were intended" "to recognize a Supreme Being," at a time when the government was publicly inveighing against atheistic communism. Nonetheless, the federal defendants argue that the Pledge must be considered as a whole when assessing whether it has a secular purpose. They claim that the Pledge has the secular purpose of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch*, 465 U.S. at 693.

The flaw in defendants' argument is that it looks at the text of the Pledge "as a whole," and glosses over the 1954 Act. The problem with this approach is apparent when one considers the Court's analysis in *Wallace*. There, the Court struck down Alabama's statute mandating a moment of silence for "meditation or voluntary prayer" not because the final version "as a whole" lacked a primary secular purpose, but because the state legislature had amended the statute specifically and solely to add the words "or voluntary prayer." 472 U.S. at 59-60.

[7] By analogy to *Wallace*, we apply the purpose prong of the *Lemon* test to the amendment that added the words "under God" to the Pledge, not to the Pledge in its final version. As was the case with the amendment to the Alabama statute in *Wallace*, the legislative history of the 1954 Act reveals that the Act's *sole*

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school children are not coerced into reciting or otherwise actively led to participating in an endorsement of the markings on the money in circulation.

purpose was to advance religion, in order to differentiate the United States from nations under communist rule. "[T]he First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion." *Id.* at 56 (citations omitted) (applying the *Lemon* test). As the legislative history of the 1954 Act sets forth:

> At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.

H.R. Rep. No. 83-1693, at 1-2 (1954), *reprinted* in 1954 U.S.C.C.A.N. 2339, 2340. This language reveals that the purpose of the 1954 Act was to take a position on the question of theism, namely, to support the existence and moral authority of God, while "deny[ing] . . . atheistic and materialistic concepts." *Id.* Such a purpose runs counter to the Establishment Clause, which prohibits the government's endorsement or advancement not only of one particular religion at the expense of other religions, but also of

religion at the expense of atheism.

> [T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. The conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of a free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects — or even intolerance among "religions" — to encompass intolerance of the disbeliever and the uncertain.

Wallace, 472 U.S. at 52-54.

[8] In language that attempts to prevent future constitutional challenges, the sponsors of the 1954 Act expressly disclaimed a religious purpose. "This is not an act establishing a religion . . . . A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God. The phrase 'under God' recognizes only the guidance of God in our national affairs." H.R. Rep. No. 83-1693, at 3 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2341-42. This alleged distinction is irrelevant for constitutional purposes. The Act's affirmation of "a belief in the sovereignty of God" and its recognition of "the guidance of God" are endorsements by the government of religious beliefs. The Establishment Clause is not limited to "religion as an institution"; this is clear from cases such as *Santa Fe*, where the Court struck down student-initiated and student-led prayer at high

school football games. 530 U.S. 310-16. The Establishment Clause guards not only against the establishment of "religion as an institution," but also against the endorsement of religious ideology by the government. Because the Act fails the purpose prong of *Lemon*, we need not examine the other prongs. *Lemon*, 403 U.S. at 612-14.

[9] Similarly, the school district policy also fails the *Lemon* test. Although it survives the first prong of *Lemon* because, as even Newdow concedes, the school district had the secular purpose of fostering patriotism in enacting the policy, the policy fails the second prong. As explained by this court in *Kreisner v. City of San Diego*, 1 F.3d 775, 782 (9th Cir. 1993), and by the Supreme Court in *School District of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985), the second *Lemon* prong asks whether the challenged government action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."[11] *Ball*, 473 U.S. at 390. Given the age and

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[11] Although *Ball* was overruled in part by *Agostini v. Felton*, 521 U.S. 203, 236 (1997), as the Court stated in *Agostini*, *Ball*'s statement of the general principles and relevant tests to be used in determining what constitutes an Establishment Clause violation remain intact; only the underlying factual assumptions and presumptions have changed. In particular, the Court rejected the following three core assumptions of *Ball*:

> (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decision making.

Agostini, 521 U.S. at 222. Therefore, *Ball*'s restatement of the second prong of *Lemon* remains valid even after *Agostini*.

impressionability of schoolchildren, as discussed above, particularly within the confined environment of the classroom, the policy is highly likely to convey an impermissible message of endorsement to some and disapproval to others of their beliefs regarding the existence of a monotheistic God. Therefore the policy fails the effects prong of *Lemon*, and fails the *Lemon* test as well as the endorsement and coercion tests.[12]

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[12] We recognize that the Supreme Court has occasionally commented in dicta that the presence of "one nation under God" in the Pledge of Allegiance is constitutional. *See Allegheny*, 492 U.S. at 602-03; *Lynch*, 465 U.S. at 676; *id.* at 693 (O'Connor, J., concurring); *Abington Sch. Dist. V. Schempp*, 374 U.S. 203, 303-04 (1963) (Brennan, J., concurring); *id.* at 306-08 (Goldberg, J., joined by Harlan, J., concurring); *Engel*, 370 U.S. at 435 n. 21. However, the Court has never been presented with the question directly, and has always clearly refrained from deciding it. Accordingly, it has never applied any of the three tests to the Act or to any school policy regarding the recitation of the Pledge. That task falls to us, although the final word, as always, remains with the Supreme Court.

The only other United States Court of Appeals to consider the issue is the Seventh Circuit, which held in *Sherman v. Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992), that a policy similar to the one before us regarding the recitation of the Pledge of Allegiance containing the words "one nation under God" was constitutional. The *Sherman* court first stated that:

> If as *Barnette* holds no state may require anyone to recite the Pledge, and if as the prayer cases hold the recitation by a teacher or rabbi of unwelcome words is coercion, then the Pledge of Allegiance becomes unconstitutional under all circumstances, just as no school may read from a holy scripture at the start of class.

[10] In conclusion, we hold that (1) the 1954 Act adding the words "under God" to the Pledge, and (2) the EGUSD's policy and practice of teacher-led recitation of the Pledge with the added words included, violate the Establishment Clause. The judgment of dismissal is vacated with respect to these two claims, and the cause is remanded for further proceedings consistent with our

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980 F.2d at 444. It then concludes, however, that this reasoning is flawed because the First Amendment "[does] not establish general rules about speech or schools; [it] call[s] for religion to be treated differently." *Id.* We have some difficulty understanding this statement; we do not believe that the Constitution prohibits compulsory patriotism as in *Barnette,* but permits compulsory religion as in this case. If government-endorsed religion is to be treated differently from government-endorsed patriotism, the treatment must be less favorable, not more.

The Seventh Circuit makes an even more serious error, however. It not only refuses to apply the *Lemon* test because of the Supreme Court's criticism of that test in *Lee*, but it also fails to apply the coercion test from *Lee* or the endorsement test from *Lynch*. Circuit courts are not free to ignore Supreme Court precedent in this manner. *Rodriguez de Quijas v.Shearson/Am.Exp., Inc.*, 490 U.S. 477, 484 (1989)("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.") Instead of applying any of the tests announced by the Supreme Court, the Seventh Circuit simply frames the question as follows: "Must ceremonial references in civic life to a deity be understood as prayer, or support for all monotheistic religions, to the exclusion of atheists and those who worship multiple gods?" 980 F.2d at 445. Relying in part on Supreme Court dicta regarding the Pledge, the court answers this question in the negative, determining that "under God" is a statement which, taken within its context in the Pledge, is devoid of any significant religious content, and therefore constitutional. *Id.* at 447-48. At the very least, as discussed above in the text, the Supreme Court requires that any policy alleged to be an Establishment Clause violation must be held to the scrutiny of the established tests. Our applications of *all* of the tests compels the conclusion that the policy and the Act challenged here violate the Establishment Clause of the Constitution. Thus, we must respectfully differ from the Seventh Circuit.

holding. Plaintiff is to recover costs on this appeal.

REVERSED AND REMANDED.

FERNANDEZ, Circuit Judge, concurring and dissenting:

I concur in parts A, B, and C[1] of the majority opinion, but dissent as to part D.

We are asked to hold that inclusion of the phrase "under God" in this nation's Pledge of Allegiance violates the religion clauses of the Constitution of the United States. We should do no such thing. We should, instead, recognize that those clauses were not designed to drive religious expression out of public thought; they were written to avoid discrimination.

We can run through the litany of tests and concepts which have floated to the surface from time to time. Were we to do so, the one that appeals most to me, the one I think to be correct, is the concept that what the religion clauses of the First Amendment require is neutrality; that those clauses are, in effect, an early kind of equal protection provision and assure that government will neither discriminate for nor discriminate against a religion or

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[1] I admit, however, to serious misgivings about standing to attack 4 U.S.C.§ 4 itself. Congress has not compelled anyone to do anything. It surely has not directed that the Pledge be recited in class; only the California authorities have done that. Even if a general lack of standing to directly attack 4 U.S.C. § 4 would deprive federal courts of the opportunity to strike "under God" from that statute, any lament would be no more than a complaint about the limits on federal judges' constitutional power. Nonetheless, that ultimately makes little difference to the resolution of the First Amendment issue in this case.

religions. *See Gentala v. City of Tucson*, 244 F.3d 1065, 1083-86 (9th Cir.)(en banc)(Fernandez, J. dissenting), *cert. granted and judgment vacated by* ___U.S. ___. 122 S. Ct. 340, 151 L. Ed. 2d 256(2001); *Goehring v. Brophy*, 94 F.3d 1294, 1306-07 (9th Cur. 1996)(Fernandez, J., concurring). But, legal world abstractions and ruminations aside, when all is said and done, the danger that "under God" in our Pledge of Allegiance will tend to bring about a theocracy or suppress somebody's beliefs is so minuscule as to be de minimis. The danger that phrase presents to our First Amendment freedoms is picayune at most.

Judges, including Supreme Court Justices, have recognized the lack of danger in that and similar expressions for decades, if not for centuries, as have presidents[2] and members of our Congress. *See, e.g., County of Allegheny v. ACLU,* 492 U.S. 573, 602-03, 672-73, 109 S. Ct. 3086, 3106, 3143, 106 L. Ed. 2d. 472 (1989); *Wallace v. Jaffree*, 472 U.S. 38, 78 n.5, 105 S. Ct. 2479, 2501 n.5, 86 L. Ed. 2d 29 (1985); *Lynch v. Donelly,* 465 U.S. 668, 676, 693, 716, 104 S. Ct. 1560, 1615-16, 10 L. Ed. 2d 844 (1963);[3] *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 622 (9th Cir. 1996)(O'Scannlain, j., concurring); *Gaylor*

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[2] *See, e.g., Lee v. Weisman*, 505 U.S. 577, 632-35, 112 S. Ct. 2649, 2679-80, 120 L. Ed. 2d 467 (1992) (Scalia, J., dissenting).

[3] The citations to the four preceding Supreme Court opinions are to majority opinions, concurring opinions, and dissents. Because my point is that a number of Justices have recognized the lack of danger and because I hope to avoid untoward complication in the setting out of the citations, I have not designated which Justices have joined in which opinion. All in all, however, perusing those opinions indicates that Chief Justice Berger, Chief Justice Rehnquist, and Justices Harlan, Brennan, White Goldberg, Marshall, Blackmun, Powell, Stevens, O'Connor, Scalia and Kennedy have so recognized.

v. United States, 74 F.3d 214, 217-18 (10th Cir. 1996); *Sherman v. Cmty Consol. Sch. Dist. 21*, 980 F.2d 437, 445-48 (7th Cir. 1992); *O'Hair v. Murray*, 588 F.2d 1144, 1144 (5th Cir. 1978) (per curiam); *Aronow v. United States*, 432 F.2d 242, 243-44 (9th Cur. 1970); *cf. Marsh v. Chambers*, 463 U.S. 783, 795, 103 S. Ct. 3330, 3338, 77 L. Ed. 2d 1019 (1983)(legislative prayer). I think it is worth stating a little more about two of the cases which I have just cited. In *County of Allegheny*, 492 U.S. at 602-03, 109 S. Ct. at 3106, the Supreme Court had this to say: "Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." The Seventh Circuit, reacting in part to that statement, has wisely expressed the following thought:

> Plaintiffs observe that the Court sometimes changes its tune when it confronts a subject directly. True enough, but an inferior court had best respect what the majority says rather than read between the lines. If the Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. IF the Justices are just pulling out leg, let them say so.

Sherman, 980 F.2d at 448.

Some, who rather choke on the notion of de minimis, have resorted to the euphemism "ceremonial deism." *See, e.g., Lynch*, 465 U.S. at 716, 104 S. Ct. at 1382 (Brennan, J., dissenting). But whatever it is called (I care not), it comes to this: such phrases as "In God We Trust," or "under God" have no tendency to establish a religion in this country or to suppress anyone's exercise, or non-exercise, of religion, except in the fevered eye of persons who most

fervently would like to drive all tincture of religion out of the public life of our policy. Those expressions have not caused any real harm of that sort of the years since 1791, and are not likely to do so in the future.[4] As I see it, that is not because they are drained of meaning.[5] Rather, as I have already indicated, it is because their tendency to establish religion (or affect its exercise) is exiguous. I recognize that some people may not feel good about hearing the phrases recited in their presence, but, then, others might not feel good if they are omitted. At any rate, the Constitution is a practical and balanced charter for the just governance of a free people in a vast territory. Thus, although we do feel good when we contemplate the effects of its inspiring phrasing and majestic promises, it is not primarily a feel-good prescription.[6] In *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 630, 642, 63 S. Ct. 1178, 1181, 1187, 87 L. Ed. 1628 (1943), for example, the Supreme Court did not say that they Pledge could not be recited in the presence of Jehovah's Witness

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[4] They have not led us down the long path to kulturkampf or worse. Those who are somehow beset by residual doubts and fears should find comfort in the reflection that no baleful religious effects have been generated by the existence of similar references to a deity throughout our history. More specifically, it is difficult to detect any signs of incipient theocracy springing up since the Pledge was amended in 1954.

[5] *See also Sherman*, 980 F.2d at 448 (Manion, J., concurring).

[6] We, by the way, indicated as much in *American Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1125-26 (9th Cir. 2002), which involved governmental conduct that was much more questionable than adoption of the phrase "under God." *See id.* at 1126-28 (Noonan, J., dissenting).

children; it merely said that they did not have to recite it.[7] That fully protected their constitutional rights by precluding the government from trenching upon "the sphere of intellect and spirit." *Id.* at 642, 63 S. Ct. at 1187. As the Court pointed out, their religiously based refusal "to participate in the ceremony [would] not interfere with or deny the rights of others to do so." *Id.* at 630, 63 S. Ct. at 1181. We should not permit Newdow's feel-good concept to change that balance.

My reading of the stelliscript suggests that upon Newdow's theory of our Constitution, accepted by my colleagues today, we will soon find ourselves prohibited from using our album of patriotic songs in many public settings. "God Bless America" and "America the Beautiful" will be gone for sure, and while use of the first and second stanzas of the Star Spangled Banner will still be permissible, we will be precluded from straying into the third.[8] And currency beware! Judges can accept those results if they limit themselves to elements and tests, while failing to look at the good sense and principles that animated those tests in the first place. But they do so at the price of removing a vestige of the awe we all must feel at the immenseness of the universe and our own small place within it, as well as the wonder we must feel at the good fortune of our country. That will coll the febrile nerves of a few at the cost of removing the healthy glow conferred upon many citizens when the forbidden verses, or phrases, are uttered, read, or seen.

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[7] I recognize that the Pledge did not then contain the phrase "under God."

[8] Nor will we be able to stray into the fourth stanza of "My Country 'Tis of Thee" for that matter.

In short, I cannot accept the eliding of the simple phrase "under God" from our Pledge of Allegiance, when it is obvious that its tendency to establish religion in this country or to interfere with the free exercise (or non-exercise) of religion is de minimis.[9]

Thus, I respectfully concur in part and dissent in part.

[9] Lest I be misunderstood, I must emphasize that to decide this case it is not necessary to say, and I do not say, that there is such a thing as a de minimis constitutional violation. What I do say is that the de minimis tendency of the Pledge to establish a religion or to interfere with its free exercise is no constitutional violation at all.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL A. NEWDOW, *Plaintiff-Appellant,* v. US CONGRESS; UNITED STATES OF AMERICA; GEORGE W. BUSH,* President of the United States; STATE OF CALIFORNIA; ELK GROVE UNIFIED SCHOOL DISTRICT; DAVID W. GORDON, Superintendent EGUSD; SACRAMENTO CITY UNIFIED SCHOOL DISTRICT; JIM SWEENEY, Superintendent SCUSD, *Defendants-Appellees.*	No. 00-16423 D.C. No. CV-00-00495-MLS/PAN ORDER

Appeal from the United States District Court
for the Eastern District of California
Milton L. Schwartz, Senior Judge, Presiding

Argued and Submitted
March 14, 2002–San Francisco, California

* George W. Bush is substituted for his predecessor, William Jefferson Clinton, as President of the United States. Fed. R. App. P. 43(c)(2)

Filed February 28, 2003

COUNSEL

Michael Newdow, Pro Se, Sacramento, California, for the plaintiff-appellant.

Kristin S. Door, Assistant United States Attorney, Sacramento, California, Lowell V. Sturgill, Jr., Department of Justice, Washington, D.C., for federal government defendants appellees; A. Irving Scott, Terence J. Cassidy, Porter, Scott, Weiberg & Delehant, Sacramento, California, for school district defendants-appellees.

ORDER

The opinion filed June 26, 2002, is ordered amended. The Clerk is instructed to file the amended opinion with Judge Fernandez's amended concurrence/dissent. Judge Reinhardt's concurrence in the order denying rehearing en banc, along with Judge O'Scannlain's and Judge McKeown's dissent from that order shall also be filed.

The Clerk is also instructed not to accept for filing any new petitions for rehearing and petitions for rehearing en banc in this case.

With the opinion thus amended, the panel has voted unanimously to deny the petitions for rehearing.

The full court has been advised of the petitions for

rehearing en banc. An active judge requested a vote on whether to rehear the matter

en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petitions for rehearing are DENIED and the petitions for rehearing en banc are DENIED.

REINHARDT, Circuit Judge, concurring in the order:

My views as to the merits of this issue are set forth in the amended majority opinion authored by Judge Goodwin, and I adhere to them fully. I write separately for two reasons unrelated to the contents of that opinion. I write first to comment on the separate dissent to the denial of rehearing en banc authored by Judge McKeown and joined in by Judges Hawkins, Thomas, and Rawlinson, in which my colleagues appear to express the view that a case should be reheard en banc whenever it involves "a question of exceptional importance."FED. R. APP. P. 35(a)(2).[1] Second, I am

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[1] While the brief separate dissent is deliberately opaque and uninformative, I would suspect that not all of its signatories believe that the general rule they appear to advocate should apply regardless of the "correctness" of the panel opinion. The concept that "exceptional importance" is, without more, a sufficient reason for en banc review is, however, shared by at least several members of the Court and accordingly merits some discussion.

compelled to register my strong disagreement with one particularly unfortunate aspect of Judge O'Scannlain's principal dissent that reflects a serious misconception of fundamental constitutional principles and the proper role of the federal judiciary.

I

As to the first question, I disagree with the notion that the importance of an issue is a sufficient reason to take a case en banc, either under the Rule or as a matter of judicial policy. Rule 35(a) advises this court of its *discretionary* power to order that a case already decided by a three-judge panel be reheard by the full court. Specifically, the rule begins by stating that a "majority of the circuit judges who are in regular active service *may* order that an appeal or other proceeding be heard or reheard by the court of appeals en banc." FED. R. APP. P. 35(a) (emphasis added). Subsection two guides such discretionary consideration by stating that one compelling reason to grant rehearing en banc is the "exceptional importance" of a particular case.

The most reasonable construction of the Rule is that this court should rehear a case en banc when it is *both* of exceptional importance *and* the decision *requires correction*. *See United States v. Burdeau*, 180 F.3d 1091, 1092 (9th Cir. 1999) (Tashima, J., concurring in the order denying rehearing en banc) ("Subject to rare exceptions, . . . we should review the statements in three[-]judge panel opinions only to 'determine whether the [panel's] legal error resulted in an erroneous judgment . . . . .' ") (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984)). A decision may warrant correction because a three-judge panel has reached a result or adopted a legal rule or principle that conflicts with our existing circuit law or that the majority of our court believes is incorrect and needs further review. The fact that three-judge panels often decide cases of exceptional importance,

whether it be the constitutionality of a state's decision to execute an individual who may be innocent, the existence or non-existence of a fundamental right, or the ability of the Congress to require the states to comply with federal law — an issue that some of us thought had been settled by the successful end to the Civil War — is an unremarkable, but undeniably important, aspect of our appellate system. *See* Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 218 (1999) (stating that three-judge panels "representing and acting on behalf of the whole court" is a "basic tenet of our intermediate appellate system"). Unless reconsidered en banc, a decision of a three-judge panel *is* a decision of our court and speaks for our court. Moreover, it ordinarily constitutes the final judicial decision.[2]

To rehear a case en banc *simply* on the basis that it involves an important issue would undermine the three-judge panel system and create an impractical and crushing burden on what otherwise should be, as Rule 35(a) suggests, an exceptional occurrence. *See* FED. R. APP. P. 35(a) ("An en banc hearing or rehearing is not favored . . . ."). According to statistics kept by the Clerk of the court, in 2002 this court decided 5,190 cases on the merits, more than 98% of which were finally decided by three-judge panels. These decisions are not measures of "rough justice," later to be

[2] While the Supreme Court unquestionably has the authority to review any or all of the decisions of the Court of Appeals, the Court has elected to hear a remarkably small number of cases in recent years. For example, in the 2001 term, of the 7,852 case filings, the Court heard argument in 88 cases, and disposed of 85 in 76 signed opinions. *See* Supreme Court of the United States, *2002 Year-End Report on the Federal Judiciary*, *at* http://www.supremecourtus.gov/publicinfo/year-end/2002year-endreport.html.

refined by the en banc court. Unless they decide issues of exceptional importance erroneously, create a direct intra-circuit split, or unless the interests of justice require that the decision be corrected, the opinions of three-judge panels should constitute the final action of this court.

II

I also feel compelled to discuss a disturbingly wrongheaded approach to constitutional law manifested in the dissent authored by Judge O'Scannlain. The dissent suggests that this court should be able to conclude that the panel's holding was erroneous by observing the "public and political reaction" to its decision. Dissent at 2783. This is not the first time that the magnitude of the political response regarding an issue has distracted certain members of this court. An equally disturbing misunderstanding of the nature of our Constitution and the role of the federal judiciary was manifested in *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), a case involving a California initiative on the subject of affirmative action. There, the three-judge panel, in a case that unfortunately was not taken en banc, notwithstanding its exceptional importance, made the following remarkable statement: "A system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy." *Id.* at 699 (O'Scannlain, J.).

The Bill of Rights is, of course, intended to protect the rights of those in the minority against the temporary passions of a majority which might wish to limit their freedoms or liberties. As Justice Jackson recognized:

The very purpose of a Bill of Rights

> was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). It is the highest calling of federal judges to invoke the Constitution to repudiate unlawful majoritarian actions and, when necessary, to strike down statutes that would infringe on fundamental rights, whether such statutes are adopted by legislatures or by popular vote. The constitutional system that vests such power in an independent judiciary does not "test[ ] the integrity of . . . democracy." It makes democracy vital, and is one of our proudest heritages.

Moreover, Article III judges are by constitutional design insulated from the political pressures governing members of the other two branches of government. We are given life tenure and a secured salary so that, in our unique capacity to "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), we may decide constitutional issues without regard to popular vote, political consequence, or the prospect of future career

advancement.[3] Most federal judges do not question the wisdom of this approach. When the federal judiciary is so firmly separated by constitutional structure from the direct influence of politics, we must not undermine that structure by allowing political pressures, polls, or "focus groups" to influence our opinions, even indirectly. This is not to say that federal judges should be completely sequestered from the attitudes of the nation we serve, even though our service is accomplished not through channeling popular sentiment but through strict adherence to established constitutional principles. The Constitution contemplates occasions when we must be responsive to *long-term* societal trends — when determining, for example, that which is "cruel and unusual," *see Hudson v. McMillian*, 503 U.S. 1, 9 (1992), whether in the execution of the mentally retarded, *see Atkins v. Virginia*, 536 U.S. 304, ___, 122 S. Ct. 2242, 2247 (2002), or the execution of juvenile offenders, *see In re Stanford*, 123 S.Ct. 472, 474 (2002) (Stevens, J., dissenting from the denial of an application for an original writ of habeas corpus). This broader long-term social

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[3] Alexander Hamilton was admirably cognizant of the danger of relying on temporary political whimsy:

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjectures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

THE FEDERALIST NO. 78, at 437 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

conscience, however, is a matter far different from responding to particular immediate political pressures. We may not — we must not — allow public sentiment or outcry to guide our decisions. It is particularly important that we understand the nature of our obligations and the strength of our constitutional principles in times of national crisis; it is then that our freedoms and our liberties are in the greatest peril. Any suggestion, whenever or wherever made, that federal judges should be encouraged by the approval of the majority or deterred by popular disfavor is fundamentally inconsistent with the Constitution and must be firmly rejected.

O'SCANNLAIN, Circuit Judge, with whom KLEINFELD, GOULD, TALLMAN, RAWLINSON, and CLIFTON, Circuit Judges, join, dissenting from the denial of rehearing en banc:

Last June, a two-judge majority of a three-judge panel of this court ruled that the Pledge of Allegiance was unconstitutional simply because of the presence of two offending words: "under God." It was an exercise in judicial legerdemain which, not surprisingly, produced a public outcry across the nation. Since that time we, as a court, have had the opportunity to order reconsideration of that decision en banc, yet a majority of the 24 active judges eligible to vote has decided not to do so. While there are, no doubt, varied and plausible reasons why this result occurred, I respectfully conclude that our court has made a serious mistake and thus must dissent from its order denying reconsideration.

I

While I cannot say that a randomly selected 11-judge panel

would have ruled differently, I believe that neither the June 2002 version, *Newdow v. United States Congress*, 292 F.3d 597 (9th Cir. 2002) ("*Newdow I*"), nor today's slightly revised version, ___ F.3d ___ ("*Newdow II*") to essentially the same effect, is defensible. We should have reheard *Newdow I* en banc, not because it was controversial, but because it was wrong, very wrong—wrong because reciting the Pledge of Allegiance is simply not "a religious act" as the two-judge majority asserts, wrong as a matter of Supreme Court precedent properly understood, wrong because it set up a direct conflict with the law of another circuit, and wrong as a matter of common sense.[1] We should have given 11 judges a chance to determine whether the two-judge majority opinion truly reflects the law of the Ninth Circuit.[2] Reciting the Pledge of Allegiance cannot possibly be an "establishment of religion"under

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[1] Judge Reinhardt's protestations to the contrary notwithstanding, I, too, believe that "[o]ur judicial charge is to stand above the inflamed passions of the public." *Dazo v. Globe Airport Sec. Serv.*, 295 F.3d 934, 943 (9th Cir. 2002) (O'Scannlain, J., concurring and dissenting). My disagreement with the panel majority has nothing to do with bending to the will of an outraged populace, and everything to do with the fact that Judge Goodwin and Judge Reinhardt misinterpret the Constitution and 40 years of Supreme Court precedent. That most people understand this makes the decision no less wrong. It doesn't take an Article III judge to recognize that the voluntary recitation of the Pledge of Allegiance in public school does not violate the First Amendment

[2] This case presents the classic situation required for our court to rehear a case en banc. En banc consideration would have allowed us to correct the error of a prior panel's decision with respect to the Pledge *and* resolve a constitutional question of exceptional importance that affects the lives of millions of school children who reside within the geographical boundaries of the Ninth Circuit. *See* Fed. R. App. P. 35(a). The exceptional importance of this case reinforces the need for correction of the panel's mistaken view of our Constitution.

any reasonable interpretation of the Constitution.[3]

Perhaps in an effort to avoid ultimate Supreme Court review, *Newdow II* which replaces it, avoids expressly reaching the technical question of the constitutionality of the 1954 Act. Fundamentally, however, the amended decision is every bit as bold as its predecessor. It bans the voluntary recitation of the Pledge of Allegiance in the public schools of the nine western states thereby directly affecting over 9.6 million students,[4] necessarily *implies* that both an Act of Congress [5] and a California law [6] are unconstitutional, clearly conflicts with the Seventh Circuit's decision in *Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling*

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[3] U.S. Const. amend. I. ("Congress shall make no law respecting an *establishment of religion*, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.") (emphasis added).

[4] *See* U.S. Dep't of Ed., Nat'l Ctr. for Ed. Statistics, available at http://nces.ed.gov/pubs2002/snf_report/table_01_1.asp. The approximate figure is for the school year 2000-01, comprising the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington, as well as Guam and the Northern Marianas.

[5] 4 U.S.C. § 4 ("The Pledge of Allegiance to the Flag: 'I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.' ").

[6] Cal. Educ. Code § 52720. This section provides that "at the beginning of the first regularly scheduled class or activity period . . . there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section."

Township, 980 F.2d 437 (1992), and threatens cash-strapped school districts and underpaid teachers with the specter of civil actions for money damages pursuant to 42 U.S.C. § 1983.

Newdow I, the subject of our en banc vote, no longer exists; it was withdrawn after the en banc call failed. The panel majority has evolved to this extent: in *Newdow I* the Pledge was unconstitutional for everybody; in *Newdow II* the Pledge is only unconstitutional for public school children and teachers. The remainder of this dissent is directed entirely to *Newdow II*, which, as shall be demonstrated, differs little from *Newdow I* in its central holding. With grim insistence, the majority in *Newdow II* continues to stand by its original error—that voluntary recitation of the Pledge of Allegiance in public school violates the Establishment Clause because, according to the two-judge panel majority, it is "a religious act." *Newdow II*, ___ F.3d at ___. Common sense would seem to dictate otherwise, as the public and political reaction should by now have made clear. If reciting the Pledge is truly "a religious act" in violation of the Establishment Clause, then so is the recitation of the Constitution [7] itself, the Declaration of

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[7] U.S. Const. art. VII. ("Year of *our Lord*") (emphasis added).

Independence, [8] the Gettysburg Address, [9] the National Motto, [10] or the singing of the National Anthem. [11] Such an assertion would make hypocrites out of the Founders, and would have the effect of driving any and all references to our religious heritage out of our schools, and eventually out of our public life.

II

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[8] The Declaration of Independence contains multiple references to God. The founders claimed the right to "dissolve the political bands" based on"the Laws of Nature and of *Nature's God*." The most famous passage, of course, is that "all men are created equal, that they are endowed by *their Creator* with certain unalienable Rights." Subsequently, the signatories "appeal[ ] to the *Supreme Judge of the world* to rectify their intentions."

[9] On November 19, 1863, President Lincoln declared "that this Nation, *under God*, shall have a new birth of freedom—and that Government of the people, by the people, for the people, shall not perish from the earth."

[10] *See* 36 U.S.C. § 302. (" '*In God* we trust' is the national motto.") (emphasis added).

[11] *See* 36 U.S.C. § 301(a) ("The composition consisting of the words and music known as the Star-Spangled Banner is the national anthem."). In fact, the Anthem is much more explicitly religious in content than the Pledge, and much more than a 'mere' profession of the *composer's* faith in a Supreme Being, as the majority would have it. *See Newdow II*, __ F.3d at ___. Consider the following passage from the fourth stanza: "Blest with victory and peace, may the *heaven-rescued* land, Praise *the Power* that hath made and preserved us a nation. Then conquer we must, when our cause is just, And this be our motto: *'In God* is our trust.' " (emphasis added).

The *Newdow II* majority's primary legal argument is that the Supreme Court's decision in *Lee v. Weisman*, 505 U.S. 577 (1992), a school prayer case, controls the outcome of this case. In fact, rather than merely following *Lee* and its predecessors, the two-judge panel majority makes a radical departure from *Lee* and the cases it purports to apply. To understand why this is so, an examination of the Supreme Court's school prayer decisions which culminate in *Lee* is in order.

A

1

The fountainhead of all school prayer cases is *Engel v. Vitale*, 370 U.S. 421 (1962). In *Engel* the Court considered a school policy whereby children were directed to say aloud a prayer composed by state officials. The Court found that this practice was inconsistent with the Establishment Clause, reasoning that "[the] program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious." *Id.* at 424-25. The Court concluded by stating that the state should leave prayer, "that purely religious function, to the people themselves." *Id.* at 435. In a footnote, it reasoned as follows:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the

> Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

Id. at 435 n.21. The Court drew an explicit distinction between patriotic invocations of God on the one hand, and prayer, an "unquestioned religious exercise," on the other. Concurring, Justice Douglas wrote that the narrow question presented was whether the state "oversteps the bounds when it finances a religious exercise." *Id.* at 439 (Douglas, J., concurring). Justice Douglas noted that the Pledge of Allegiance, "like . . . prayer, recognizes the existence of a Supreme Being." *Id.* at 440 n.5. However, he noted that the House Report recommending the addition of the words "under God" to the Pledge stated that those words "in no way run contrary to the First Amendment but recognize 'only the guidance of God in our national affairs.' " *Id.* (quoting H.R. Rep. No. 1693, 83d Cong., 2d Sess., p. 3).

2

The following year, the Supreme Court decided *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963). In that case, the Court considered the constitutionality of a Pennsylvania statute requiring that "[a]t least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day." *Id.* at 205. The practice in public schools was for a teacher or student volunteer to read the required Bible verses each morning. This in turn was followed by a recitation of the

Lord's prayer. Finally, the class would recite the Pledge of Allegiance to the Flag. *Id.* at 207-08. The Court struck down the Bible reading and the practice of reciting the Lord's prayer as a state prescribed "religious ceremony," *id.* at 223, but said nothing about the practice of reciting the Pledge.

As in *Engel*, the Court took pains to point to the character of the exercises it found wanting. The Court reasoned that "reading . . . the verses . . . possesses a devotional and religious character and constitutes in effect a religious observance. The devotional and religious nature of the morning exercises is made all the more apparent by the fact that the Bible reading is followed immediately by a recital in unison by the pupils of the Lord's prayer." *Id.* at 210. "The pervading religious character of the ceremony," wrote Justice Clark, "cannot be gainsaid," and led to the conclusion that the exercises violated the Establishment Clause. *Id.* at 224.

The concurring opinions in *Schempp* were all to the same effect. Justice Douglas agreed with the majority's conclusion that the practices at issue violated the Establishment Clause because "the State is conducting a religious exercise." *Id.* at 229 (Douglas, J., concurring). In a lengthy concurrence, Justice Brennan wrote that "[t]he religious nature of the exercises here challenged seems plain." *Id.* at 266 (Brennan, J., concurring) After surveying the history of devotional exercises in American public schools, Justice Brennan stated that "the panorama of history permits no other conclusion than that daily prayers and Bible readings in the public schools have always been designed to be, and have been regarded as, essentially religious exercises." *Id.* at 277-78. For Justice Brennan, "religious exercises in the public schools present a unique problem" but "not every involvement of religion in public life violates the Establishment Clause." *Id.* at 294. He warned that "[a]ny attempt to impose rigid limits upon the mention of God. .

. in the classroom would be fraught with dangers." *Id.* at 301. Specifically, he wrote that "[t]he reference to divinity in the revised pledge of allegiance . . . may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact." *Id.* at 304.

Justice Goldberg also wrote separately, stating that "the clearly religious practices presented in these cases are . . . wholly compelling." *Id.* at 305 (Goldberg, J., concurring). He reasoned that "[t]he pervasive religiosity and direct governmental involvement inhering in the prescription of prayer and Bible reading in the public schools . . . cannot realistically be termed simply accommodation." *Id.* at 307. Like Justice Brennan, Justice Goldberg cautioned that the decision "does not mean that all incidents of government which import of the religious are therefore and without more banned by the strictures of the Establishment Clause." *Id.* at 307-08. He then quoted in full the passage from *Engel* which drew a distinction between patriotic invocations of God, and unquestioned religious exercises that give rise to Establishment Clause violations. *Id.*

3

The next case in this line is *Wallace v. Jaffree*, 472 U.S. 38 (1985). That case considered the constitutionality of an Alabama statute authorizing a 1-minute period of silence in public schools "for meditation or voluntary prayer." *Id.* at 40. The Court found that "[t]he wholly religious character" of the challenged law was "plainly evident from its text." *Id.* at 58. The legislature's one and only purpose in enacting the law was "to return prayer to the

public schools." *Id.* at 59-60. Justice Powell's separate concurrence was "prompted by Alabama's persistence in attempting to institute state-sponsored prayer in the public schools." *Id.* at 62 (Powell, J., concurring). Justice O'Connor wrote separately to suggest that moment-of-silence statutes were not "a religious exercise," and therefore were constitutional. *Id.* at 72 (O'Connor, J., concurring). Justice O'Connor wrote further that "the words 'under God' in the Pledge . . . serve as an acknowledgment of religion with 'the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.' " *Id.* at 78 n.5 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 693 (O'Connor, J., concurring)) (alterations in original). In contrast, the Alabama statute at issue was very different from the Pledge—the state had "intentionally crossed the line [by] affirmatively endorsing the particular religious practice of prayer." *Id.* at 84.

4

Finally, there is the Supreme Court's decision in *Lee v. Weisman*. The issue presented was "whether including clerical members who offer prayers as part of the official school graduation ceremony" is consistent with the Establishment Clause. 505 U.S. at 580. The graduating students entered as a group in a processional, after which "the students stood for the Pledge of Allegiance and remained standing during the rabbi's prayers." *Id.* at 583. Justice Kennedy wrote that "the significance of the prayers lies . . . at the heart of [the] case." *Id.* He framed the inquiry as follows:

> These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for

> secondary schools. Even for those students who object to the religious exercise their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

Id. at 586.

The Court in *Lee* concluded that *Engel* and its progeny controlled the outcome, writing that "[c]onducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students." *Id.* at 587. As in *Engel*, *Schempp*, and *Wallace*, the crucial factor was the nature of the exercise in which the students were asked to participate. Time and again the Court went out of its way to stress the nature of the exercise, writing that prayer was "an overt religious exercise," *id.* at 588, and that "prayer exercises in public schools carry a particular risk of indirect coercion." *Id.* at 592. The practice was unconstitutional because "the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student." *Id.* at 598. Just like the decisions in *Engel* and *Schempp*, the Court in *Lee* took pains to stress the confines of its holding, concluding that "[w]e do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive," *id.* at 597, and that "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Id.* at 598.

B

Two fundamental principles may therefore be derived from the school prayer cases culminating in *Lee*.

1

Formal religious observances are prohibited in public schools because of the danger that they may effect an establishment of religion. *See Engel*, 370 U.S. at 424-25 ("[D]aily classroom invocation of God's blessings . . . is a religious activity."); *Schempp*, 374 U.S. at 210 (Bible reading followed by the Lord's prayer "possesses a devotional and religious character and constitutes in effect a religious observance."); *Wallace*, 472 U.S. at 58 (Prayer is of a "wholly religious character."); *Lee*, 505 U.S. at 586 (Prayer written by state officials constitutes a "formal religious exercise"). In each of these cases, the Court took pains to stress that not every reference to God in public schools was prohibited. *See Engel*, 370 U.S. at 435 n.21 ("patriotic or ceremonial occasions" which contain "references to the Deity" bear "no true resemblance to the unquestioned religious exercise" of prayer); *Schempp*, 374 U.S. at 301 (Brennan, J., concurring) ("Any attempt to impose rigid limits upon the mention of God . . . in the classroom would be fraught with dangers."); *Wallace*, 472 U.S. at 78 n.5 (O'Connor, J., concurring) ("the words 'under God' in the Pledge" are not unconstitutional); *Lee*, 505 U.S. at 598 ("A relentless and all-pervasive attempt to exclude religion . . .could itself become inconsistent with the Constitution.").

2

Once it is established that the state is sanctioning a formal religious exercise, then the fact that the students are not *required* to participate in the formal devotional exercises does not prevent

those exercises from being unconstitutional. *See Engel*, 370 U.S. at 431 ("[T]he indirect coercive pressure upon religious minorities to conform" to the prayer exercises "is plain."); *Schempp*, 374 U.S. at 210-11 ("The fact that some pupils, or theoretically all pupils, might be excused from attendance at the exercises does not mitigate the obligatory nature of the ceremony."); *Wallace*, 472 U.S. at 57 (State-sanctioned *voluntary* prayer in public schools violates Establishment Clause); *Lee*, 505 U.S. at 592 ("[P]rayer exercises in public schools carry a particular risk of indirect coercion."). To be sure, *Lee* is the Court's most elaborate pronouncement with respect to indirect coercion. It identifies the circumstances in which indirect coercion may be said to be unconstitutional: when the government directs "the performance of a formal religious exercise" in such a way as to oblige the participation of objectors. *Lee*, 505 U.S. at 586.

III

No court, state or federal, has *ever* held, even now, that the Supreme Court's school prayer cases apply outside a context of state-sanctioned formal religious observances. But *Newdow II* finesses all that, and the sleight of hand the majority uses becomes immediately apparent: obfuscate the nature of the exercise at issue and emphasize indirect coercion. The panel majority simply ignores, because they are inconvenient, the "dominant and controlling facts" in *Lee* and its predecessors: that Establishment Clause violations in public schools are triggered only when "State officials direct the performance of a *formal religious exercise*." 505 U.S. at 586 (emphasis added); *see also Schempp*, 374 U.S. at 210 ("devotional . . . religious observance" prohibited); *Wallace*, 472 U.S. at 58 (activities of a "wholly religious character" prohibited).

A

To avoid a flagrant inconsistency with *Lee*, and with 40 years of Supreme Court precedent, the two-judge panel majority must first examine whether the act of pledging allegiance is "a religious act." As the Seventh Circuit in *Sherman* framed it, "Does 'under God' make the Pledge a prayer, whose recitation violates the establishment clause of the first amendment?" 980 F.2d at 445. That court answered the question in the negative; the *Newdow II* majority, in conclusory fashion, simply *assumes* the affirmative. ___ F.3d at ___ ("[W]e conclude that the school district policy impermissibly coerces *a religious act*.") (emphasis added).

This assertion belies common sense. Most assuredly, to pledge allegiance to flag and country is a *patriotic* act. After the public and political reaction last summer, it is difficult to believe that anyone can continue to think otherwise. The fact the Pledge is infused with an undoubtedly religious reference does not change the nature of the act itself. The California statute under which the school district promulgated its policy is entitled "[d]aily performance of *patriotic exercises* in public schools." Cal. Educ. Code § 52720 (emphasis added). The Pledge is recited not just in schools but also at various official events and public ceremonies, including perhaps the most patriotic of occasions—naturalization ceremonies. Generally, the Pledge is recited while standing, facing a United States flag, with the right hand held over the heart, much like the National Anthem. *See* 4 U.S.C. § 4 (articulating proper procedure for reciting Pledge); 36 U.S.C. § 301 (during anthem "all present . . . should stand at attention facing the flag with the right hand over the heart."). Whatever one thinks of the normative values underlying the Pledge, they are unquestionably patriotic in nature. Indeed, it is precisely because of the Pledge's explicitly patriotic nature that in 1943 the Supreme Court ruled that no one

is *required* to Pledge allegiance against their will. *West Virginia v. Barnette*, 319 U.S. 624, 642 (1943).

In contrast, to pray is to speak directly to God, with bowed head, on bended knee, or some other reverent disposition. It is a solemn and humble approach to the divine in order to give thanks, to petition, to praise, to supplicate, or to ask for guidance. Communal prayer, by definition, is an even more forceful and profound experience for those present. Little wonder that the Supreme Court has recognized the "unique problem" and "particular risk" posed by school prayer to nonparticipating students. *Lee*, 505 U.S. at 592 ("[P]rayer exercises in public schools carry a particular risk of indirect coercion."); *Schempp*, 374 U.S. at 294 (Brennan, J., concurring) (noting that prayers in public schools "present a unique problem").

Not only does the panel majority's conclusion that pledging allegiance is "a religious act" defy common sense, it contradicts our 200-year history and tradition of patriotic references to God. The Supreme Court has insisted that interpretations of the Establishment Clause must comport "with what history reveals was the contemporaneous understanding of its guarantees." *Lynch*, 465 U.S. at 673; *see also Schempp*, 374 U.S. at 294 ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.") (Brennan, J., concurring).

The majority's unpersuasive and problematic disclaimers notwithstanding, *Newdow II* precipitates a "war with our national tradition," *McCollum v. Bd. of Ed.*, 333 U.S. 203, 211 (1948), and as Judge Fernandez so eloquently points out in dissent, only the purest exercise in sophistry could save multiple references to our

religious heritage in our national life from *Newdow II*'s axe. Of course, the Constitution itself explicitly mentions God, as does the Declaration of Independence, the document which marked us as a separate people. The Gettysburg Address, inconveniently for the majority, contains the *same precise phrase*—"under God"—found to constitute an Establishment Clause violation in the Pledge.[12]

After *Newdow II*, are we to suppose that, were a school to permit—not require—the recitation of the Constitution, the Declaration of Independence, or the Gettysburg Address in public schools, that too would violate the Constitution? Were the "founders of the United States . . . unable to understand their own handiwork[?]" *Sherman*, 980 F.2d at 445. Indeed, the recitation of the Declaration of Independence would seem to be the better candidate for the chopping block than the Pledge, since the Pledge does not require anyone to acknowledge the *personal* relationship with God to which the Declaration speaks.[13] So too with our National Anthem and our National Motto.

Our national celebration of Thanksgiving dates back to President Washington, which Congress stated was "to be observed by acknowledgment with grateful hearts, the many and signal favours of Almighty God." *Lynch*, 465 U.S. at 675 n.2. Congress made Thanksgiving a permanent holiday in 1941,[14] and Christmas

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[12] *See infra* footnote 9.

[13] *See infra* footnote 8.

[14] *See* 5 U.S.C. § 6103(a).

has been a national holiday since 1894.[15] Are pere Newdow's constitutional rights violated when his daughter is told not to attend school on Thanksgiving? On Christmas day? Must school outings to federal courts be prohibited, lest the children be unduly influenced by the dreaded intonation "God save these United States and this honorable Court"?[16] A theory of the Establishment Clause that would have the effect of driving out of our public life the multiple references to the Divine that run through our laws, our rituals, and our ceremonies is no theory at all.

B

As if all of this were not enough, the Supreme Court has gone out of its way to make it plain that the Pledge itself passes constitutional muster. In two of the school prayer cases, the Court noted without so much as a hint of disapproval the fact that the students, in addition to being subject to formal religious observances, *also* recited the Pledge of Allegiance. *See Schempp*, 374 U.S. at 207-08 (noting that the practice in public schools consisted of Bible reading and recitation of the Lord's prayer, followed by recitation of the Pledge); *Lee*, 505 U.S. at 583 (noting that "the students stood for the Pledge of Allegiance and remained standing during the rabbi's prayers.").

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[15] *See id.*

[16] Indeed, even our own court's formal announcement to open sessions contains the offending word: "Hear ye! hear ye! All persons having business with the honorable, the United States Court of Appeals for the Ninth Circuit will now draw near, give your attention and you will be heard, for this court is now in session. *God save* these United States and this honorable Court." (emphasis added).

Several other Supreme Court cases contain explicit references to the constitutionality of the Pledge. *See Engel*, 370 U.S. at 440 n.5 (Douglas, J., concurring) ("[The Pledge] in no way run[s] contrary to the First Amendment") (quoting H.R. Rep. No. 1693, 83d Cong., 2d Sess., p. 3); *Schempp*, 374 U.S. at 304 (Brennan, J., concurring) ("[R]eciting the pledge may be no more of a religious exercise than the reading aloud of Lincolns' Gettysburg Address."); *Wallace*, 472 U.S. at 78 n.5 (O'Connor, J., concurring) ("[T]he words 'under God' in the Pledge . . . serve as an acknowledgment of religion."); *Co. of Allegheny v. ACLU*, 492 U.S. 573, 602-03 (Blackmun, J., for the court) ("Our previous opinions have considered in dicta . . . the pledge, characterizing [it] as consistent with the proposition that government may not communicate an endorsement of religious belief."); *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984) (Burger, C.J., for the court) ("Other examples of reference to our religious heritage are found . . . in the language 'One nation under God,' as part of the Pledge of Allegiance to the American flag. That pledge is recited by many thousands of public school children—and adults—every year.").

The panel majority's answer to these myriad statements from our high court is summarily to dismiss them as dicta. However, "dicta of the Supreme Court have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold. We should not blandly shrug them off because they were not a holding." *Zal v. Steppe*, 968 F.2d 924, 935 (9th Cir. 1992) (Noonan, J., concurring and dissenting in part); *see also United States v. Baird*, 85 F.3d 450, 453 (9th Cir. 1996) ("[W]e treat

Supreme Court dicta with due deference.").[17]

C

The *Newdow II* majority, then, finds itself caught between a rock and a hard place—the recitation of the Pledge is not a formal religious act, while patriotic invocations of God do not give rise to Establishment Clause violations. It nonetheless manages to skirt these obstacles to reach its indirect coercion analysis. *Newdow II*'s conclusory foray into the social sciences is a case study, an advertisement, for why it is that the Supreme Court has anchored coercion analysis only to those situations where "formal religious exercises" take place in our public schools. The panel majority seeks to protect dissenters at the risk of courting some unpopularity, but this is not the test. "[O]ffense alone does not in every case show a violation . . . . and sometimes to endure social isolation or even anger may be the price of conscience or nonconformity." *Lee*, 505 U.S. at 597-98. The *Newdow II* majority's

[17] Other courts have, unremarkably enough, not been so flippant when it comes to considering consistent Supreme Court dicta on this issue. *See Sherman*, 980 F.2d at 448 ("[A]n inferior court had best respect what the majority says rather than read between the lines. If the Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so."); *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) ("[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements."); *ACLU v. Capital Square Review*, 243 F.3d 289, 301 n.10 (6th Cir. 2001) ("We should . . . be amazed if the Supreme Court were now to question the constitutionality of the [revised Pledge]"). Indeed, the unanimity on this point relative to *Newdow II* is striking.

expansive application of the coercion test is ill-suited to a society as diverse as ours, since almost *every* cultural practice is bound to offend *someone's* sensibilities. In affording Michael Newdow the right to impose his views on others, *Newdow II* affords him a right to be fastidiously intolerant and self-indulgent. In granting him this supposed right, moreover, the two-judge panel majority has not eliminated feelings of discomfort and isolation, it has simply shifted them from one group to another.

Newdow II's psychological ipse dixit is also delivered without reference or regard to our collective experience in the half-century since the passage of the offending statute. In that time, generations of Americans have grown up reciting the Pledge, religious tolerance and diversity has flourished in this country, and we have become a beacon for other nations in this regard. As Judge Fernandez observes, "it is difficult to detect any signs of incipient theocracy springing up since the Pledge was amended in 1954." *Newdow II* ___ F.3d at ___ n.4 (Fernandez, J., dissenting).

IV

In fairness to the *Newdow II* panel majority, its professed "neutrality" does have some plausible basis in the case law of the Supreme Court, which has undoubtedly constructed a "fractured and incoherent doctrinal path" in the Establishment Clause area, broadly speaking. *Sep. of Church and State Comm. v. City of Fugene*, 93 F.3d 617, 622 (9th Cir. 1996) (O'Scannlain, J., concurring). Indeed, its Establishment Clause cases sometimes "more closely resemble ad hoc Delphic pronouncements than models of guiding legal principles." *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 282 (5th Cir. 1996) (Jones, J., dissenting from denial of rehearing en banc). Supreme Court Justices themselves have

recognized that if some of its reasoning "were to be applied logically, it would lead to the elimination" of many cherished, long-standing practices. *Co. of Allegheny*, 492 U.S. at 674 n.10 (Kennedy, J., dissenting).

With respect to the issue presented in *this* case, however, the Supreme Court has displayed remarkable consistency—patriotic invocations of God simply have no tendency to establish a state religion. Even Justice Brennan, that most stalwart of separationists, recognized that *some* official acknowledgment of God is appropriate "if the government is not to adopt a stilted indifference to the religious life of the people." *Lynch*, 465 U.S. at 714 (Brennan, J., dissenting). The decision reached in *Newdow II* does precisely that: it adopts a stilted indifference to our past and present realities as a predominantly religious people.

But *Newdow II* goes further, and confers a favored status on atheism in our public life. In a society with a pervasive public sector, our public schools are a most important means for transmitting ideas and values to future generations. The silence the majority commands is *not* neutral—it itself conveys a powerful message, and creates a distorted impression about the place of religion in our national life.[18] The absolute prohibition on any mention of God in our schools creates a bias *against* religion. The panel majority cannot credibly advance the notion that *Newdow II* is neutral with respect to belief versus non-belief; it affirmatively favors the latter to the former. One wonders, then, does atheism become the default religion protected by the Establishment Clause?

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[18] *See* Michael W. McConnell, *Religious Freedom at the Crossroads*, 59 U. Chi. L. Rev. 115, 189 (1992).

In short, a lack of clarity in the Supreme Court's Establishment Clause cases generally does not help to explain or to justify the panel majority's decision with respect to *this* particular issue. Put simply, the panel was asked to decide whether the recitation of the Pledge of Allegiance in public schools amounted to a government establishment of religion. The answer to that question is clearly, obviously, no. We made a grave error in failing to take *Newdow I* en banc, and we have failed to correct that error ourselves. Now we have *Newdow II*. Perhaps the Supreme Court will have the opportunity to correct the error for us. I must respectfully dissent from the order denying reconsideration en banc.

McKEOWN, Circuit Judge, with whom HAWKINS, THOMAS, and RAWLINSON, Circuit Judges, join, dissenting from the denial of rehearing en banc:

The recitation of the Pledge of Allegiance by school children presents a constitutional question of exceptional importance that merits reconsideration by the en banc court. *See* Fed. R. App. P. 35(a)(2) (en banc hearing appropriate when "the proceeding involves a question of exceptional importance"). Although not every case of exceptional importance can or should be reheard en banc, this is a case that should be reheard. I respectfully dissent from the court's decision to deny rehearing en banc.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL A. NEWDOW,
Plaintiff-Appellant,

v.

US CONGRESS; UNITED STATES OF AMERICA; GEORGE W. BUSH*, PRESIDENT OF THE UNITED STATES; STATE OF CALIFORNIA; ELK GROVE UNIFIED SCHOOL DISTRICT; DAVID W. GORDON, SUPERINTENDENT EGUSD; SACRAMENTO CITY UNIFIED SCHOOL DISTRICT; JIM SWEENEY, SUPERINTENDENT SCUSD,
Defendants-Appellees.

No. 00-16423

D.C. No.
CV-00-00495-MLS/PAN

ORDER AND
OPINION

Appeal from the United States District Court
for the Eastern District of California
Edward J. Schwartz, Senior Judge, Presiding

Argued and Submitted
March 14, 2002–San Francisco, California

Filed December 4, 2002

Before: Alfred T. Goodwin, Stephen Reinhardt and

Ferdinand F. Fernandez, Circuit Judges

Opinion by Judge Goodwin,
Concurrence by Judge Fernandez

ORDER

GOODWIN, Circuit Judge:

After we issued our June 26, 2002 opinion in this case, Sandra Banning, the mother of Michael Newdow's daughter, filed a motion for leave to intervene, in order to, inter alia, challenge Newdow's standing to maintain this action. Banning attached to her motion as an exhibit a copy of a February 6, 2002 California Superior Court custody order. That order awarded Banning "sole legal custody" of the child. We have carefully reconsidered the question of Newdow's Article III standing in light of this custody order and affirm our holding that he has standing as a parent to continue to pursue his claim in federal court.

I. FACTUAL AND PROCEDURAL BACKGROUND

When this case first reached us from the district court, no legal custody question or order had been disclosed to the federal courts. Newdow had alleged in the district court that he was the father, and had custody of the minor child. The record now indicates that Newdow and Banning formed a family consisting of an unmarried man, an unmarried woman, and their biological minor child, who lived together part of the time and lived in separate homes in Florida and California, from time to time, with informal visiting arrangements. This informal arrangement apparently was not subject to any custody order until February 6,

2002, after Newdow had appealed from the dismissal of the action he had commenced in federal district court to challenge on Establishment Clause grounds the practice of reciting the pledge of allegiance in the public elementary school his child attends.

On February 6, the California Superior Court entered an order containing the following language:

> The child's mother, Ms. Banning, to have sole legal custody as to the rights and responsibilities to make decisions relating to the health, education and welfare of [the child]. Specifically, both parents shall consult with one another on substantial decisions relating to non-emergency major medical care, dental, optometry, psychological and educational needs of [the child]. If mutual agreement is not reached in the above, then Ms. Banning may exercise legal control of [the child] that is not specifically prohibited or inconsistent with the physical custody order. The father shall have access to all of [the child's] school and medical records.

Thereafter, Newdow, alleging "changed circumstances," filed a motion in the Superior Court for a modification of the custody order, seeking, inter alia, joint legal custody with Banning of their child.

On September 25, 2002, the Superior Court (Judge Mize) entered an in personam order enjoining Newdow from pleading his daughter as an unnamed party or representing her as a "next friend" in this lawsuit. The United States promptly filed a motion, which we have granted, to enlarge the record to include the state

court transcript of the September 25 hearing before Judge Mize. That transcript contemplates a full trial in the future on Newdow's motion for modification of the February 6 custody order.

Judge Mize appropriately reserved to this court, however, the question of Newdow's Article III standing in federal court. Newdow no longer claims to represent his child, but asserts that he retains standing in his own right as a parent to challenge alleged unconstitutional state action affecting his child while she attends public school in the Elk Grove Unified School District (EGUSD).

II. DISCUSSION

Our original opinion in this case holds that a parent has Article III standing to challenge on Establishment Clause grounds state action affecting his child in public school. See Newdow v. U.S. Congress, 292 F.3d 597, 602 (9th Cir. 2002) (citing *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 795 (9th Cir. 1999) (en banc) and *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir. 1985)). Banning's motion for leave to intervene presents a question of first impression in this Circuit which we are required to consider, even though raised for the first time on appeal. *See United States v. Viltrakis*, 108 F.3d 1159, 1160 (9th Cir. 1997) ("The jurisdictional issue of standing can be raised at any time."). Does the grant of sole legal custody to Banning deprive Newdow, as a noncustodial parent, of Article III standing to object to unconstitutional government action affecting his child?

A Seventh Circuit decision, *Navin v. Park Ridge School District 64*, 270 F.3d1147 (7th Cir. 2001) (per curiam), addresses a noncustodial parent's standing to challenge a school's educational plan for his disabled child under the Individuals with Disabilities Education Act (IDEA). Though not controlling, the

Seventh Circuit's reasoning in *Navin* illustrates a useful method of analysis for the standing question presented here. The divorce decree in that case had granted the mother sole legal custody of her son. The Illinois Marriage and Dissolution of Marriage Act provided that the legal custodian may determine, absent an agreement by the parties to the contrary, "the child's uprising, including but not limited to, his education, health care and religious training." *See* 750 IL CH § 5/608(a). Contending that tutoring for his dyslexic son was being provided by a "crossing guard supervisor with no skill (or at least no certification) in educating dyslexic youths," the father in *Navin* had asked for an administrative hearing under the IDEA and filed suit in federal court when the hearing officer terminated the proceeding without addressing the merits. 270 F.3d at 1148. The district court dismissed the father's suit, holding that as a noncustodial parent, he had no standing to challenge action affecting his child in school. *Id.*

The Seventh Circuit held, however, that noncustodial parents do not automatically lack standing under the IDEA. 270 F.3d at 1149. Instead, the court of appeals explained that whether the noncustodial father in *Navin* had standing depended on the parental rights granted or reserved to him in the divorce decree in light of the mother's assertion of her rights so granted or reserved:

> If the decree had wiped out all of [the noncustodial father's] parental rights, it would have left him with no claim under the IDEA. But this is not what the divorce decree does. The district court did not analyze its language, but it is in the record and shows that [the noncustodial father] retains some important rights, including the opportunity to be informed about and remain involved in the

> education of his son. If [the father and mother] disagree about educational decisions, then [the mother's] view prevails--unless under state law the school district's view prevails over either parent's wishes, and in that event [the father's] rights under the decree to influence the school's choices are even more important.

270 F.3d at 1149-1150 (internal citations omitted) (emphasis in original). Accordingly, the Seventh Circuit remanded the case to the district court, instructing it to "decide whether [the father's] claims [were] incompatible, not with the divorce decree itself, but with [the mother's] use of her rights under the decree." *Navin*, 270 F.3d at 1149-1150 (emphasis in original).

Navin's general approach to the problem of noncustodial parental standing is sound. We hold that a noncustodial parent, who retains some parental rights, may have standing to maintain a federal lawsuit to the extent that his assertion of retained parental rights under state law is not legally incompatible with the custodial parent's assertion of rights. This holding assumes, of course, that the noncustodial parent can establish an injury in fact that is fairly traceable to the challenged action, and it is likely that the injury will be redressed by a favorable decision. *See Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000). Having already held that Newdow satisfies those Article III requirements, see Newdow, 292 F.3d at 603-05, we now turn to the question of whether he retains standing despite Banning's opposition as sole legal custodian to his

maintaining this lawsuit.[1]

The February 6 custody order governing Banning's and Newdow's respective parental decision-making power remains operative and plainly does not strip Newdow of all of his parental rights. Rather, that order establishes that Newdow retains rights with respect to his daughter's education and general welfare. He has the right to consult with Banning regarding substantial non-emergency decisions (with Banning having ultimate decision-making power), as well as the right to inspect his daughter's school and medical records regardless of Banning's position.

California state courts have recognized that noncustodial parents maintain the right to expose and educate their children to their individual religious views, even if those religious views contradict those of the custodial parent or offend her.[2] *See Murga v. Petersen*, 103 Cal. App. 3d 498 (1980). As the *Murga* court noted, it was following the "majority of American jurisdictions" in refusing to place restraints on a noncustodial parent who wished to expose his children to his particular religious views, absent a clear, affirmative showing that these religious activities would be harmful to the children. Id. at 504-05 (emphasis added). The principle of nonintervention, the court noted, "reflects the

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[1] It is unclear to us exactly what relief Banning seeks. In her motion papers, at times Banning appears to object only to Newdow's appearance as "next friend" of their daughter. At other places, she also seems to object to Newdow's standing in his own right.

[2] As the Supreme Court has acknowledged, recognized religions exist that do not teach a belief in God, e.g., secular humanism." *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11, 6 L. Ed. 2d 982, 81 S. Ct. 1680 (1961).

protected nature of religious activities and expressions of belief, as well as the proscription against preferring one religion over another." Id. at 505. It is not only the court that must not interfere; even more so, the state and federal government may not seek to indoctrinate the child with their religious views, particularly over the objection of either parent.

Murga was the basis for a later California state court decision, In *re Mentry*, 142 Cal. App. 3d 260, 190 Cal. Rptr. 843 (1983), that reversed a restraining order against a noncustodial father that forbade him from engaging his children in any religious activities other than those approved by the custodial mother. The *Mentry* court stated that "the concept of family privacy embodies not simply a policy of minimum state intervention but also a presumption of parental autonomy. Many of the purposes served by this presumption become more important after dissolution [of the marriage or relationship] than they were before." 142 Cal. App. 3d at 268 (emphasis added). The type of "minimum state intervention" discussed in *Mentry* surely does not permit official state indoctrination of an impressionable child on a daily basis with an official view of religion contrary to the express wishes of either a custodial or noncustodial parent. We conclude that Newdow retains sufficient parental rights to support his standing here.

The next question, then, is whether Banning's status as sole legal custodian empowers her to employ state law to defeat Newdow's standing. " 'Sole legal custody' means that one parent shall have the right and the responsibility to make the decisions relating to the health, education, and welfare of a child." Cal. Fam. Code § 3006. Thus, Newdow cannot disrupt Banning's choice of schools for their daughter. And, as Judge Mize's September 25 order makes clear, Newdow cannot name his daughter as a party

to a lawsuit against Banning's wishes.

Judge Mize, however, appropriately declined to rule on whether Newdow has standing in his own right as a parent to maintain this case in federal court. We hold that Banning has no power, even as sole legal custodian, to insist that her child be subjected to unconstitutional state action. Newdow's assertion of his retained parental rights in this case, therefore, simply cannot be legally incompatible with any power Banning may hold pursuant to the custody order. Further, Ms. Banning may not consent to unconstitutional government action in derogation of Newdow's rights or waive Newdow's right to enforce his constitutional interests. Neither Banning's personal opinion regarding the Constitution nor her state court award of legal custody is determinative of Newdow's legal rights to protect his own interests.

When school teachers lead a recitation of the Pledge of Allegiance according to school district policy, they present a message by the state endorsing not just religion generally, but a monotheistic religion organized "under God." While Newdow cannot expect the entire community surrounding his daughter to participate in, let alone agree with, his choice of atheism and his daughter's exposure to his views, he can expect to be free from the government's endorsing a particular view of religion and unconstitutionally indoctrinating his impressionable young daughter on a daily basis in that official view. The pledge to a nation "under God," with its imprimatur of governmental sanction, provides the message to Newdow's young daughter not only that non-believers, or believers in non-Judeo-Christian religions, are outsiders, but more specifically that her father's beliefs are those of an outsider, and necessarily inferior to what she is exposed to in the classroom. Just as the foundational principle of the Freedom

of Speech Clause in the First Amendment tolerates unpopular and even despised ideas, *see Cohen v. California*, 403 U.S. 15, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971), so does the principle underlying the Establishment Clause protect unpopular and despised minorities from government sponsored religious orthodoxy tied to government services. *See Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 147 L. Ed. 2d 295, 120 S. Ct. 2266 (2000); *Lee v. Weisman*, 505 U.S. 577, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992). Accordingly, we affirm Newdow's standing to challenge on Establishment Clause grounds the EGUSD's practice of requiring his daughter to attend daily recitations of the 1954 version of the Pledge of Allegiance.

Banning's motion for leave to intervene is DENIED because she has no protectable interest at stake in this action.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

Rev. Dr. Michael A. Newdow,

Plaintiff,

v.

The Congress of the United States, et al.,

Defendants.

CIV. S-00-0495 MLS PAN PS

ORDER

FILED
Jul 21 2000
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

This matter was referred to the Honorable Peter A. Nowinski, United States Magistrate Judge, pursuant to 28 U.S.C. §§ 636, et seq., and Local Rule 72-302. On May 25, 2000, Judge Nowinski recommended that plaintiff's complaint be dismissed. Plaintiff has filed objections to the findings and recommendation.

The Court has reviewed the file and finds the findings and recommendation to be supported by the record and by the magistrate judge's analysis. Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendation filed May 25, 2000, are adopted in full; and

2. Plaintiff's complaint is dismissed.

DATED: July 21, 2000

/s/MILTON L. SCHWARTZ
United States District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

Rev. Dr. Michael A. Newdow,

Plaintiff,

v.

The Congress of the United States, et al.,

Defendants.

CIV. S-00-0495 MLS PAN PS

ORDER

FILED
MAY 25 2000
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

On March 8, 2000, plaintiff filed a complaint alleging defendants Elk Grove School District and Sacramento City Unified School District violate the Establishment Clause of the First Amendment by requiring teachers lead morning classes in recitation of the pledge of allegiance. Defendant school districts move to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

The only federal Court of Appeal directly to address this issue held that schools may lead the pledge of allegiance without violating the First Amendment so long as pupils are not compelled to participate, because the ceremonial reference to God in the pledge does not convey endorsement of particular religious beliefs. Sherman v. Community Consolidated School District, 980 F.2d 437, 442-448 (11th Cir. 1992). While the Supreme Court has not directly addressed the issue, it has noted that its "previous opinions